Docket for 03-339

(33)

No. 03-339 Status: ARGUED
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Title: Jose Francisco Sosa, Petitioner
v.
Humberto Alvarez-Machain, et al.
Docketed: September 5, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (99-56880)
Decision Date: June 3, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 2 2003	Petition for writ of certiorari filed. (Response due October 6, 2003)
Sep 25 2003	Brief of respondent United States in support filed.
Oct 2 2003	Blanket consent to the filing of amici briefs in support of either party received from counsel for the petitioner and counsel for the respondent.
Oct 6 2003	Brief of respondents Humberto Alvarez-Machain, et al. in opposition filed.
Oct 6 2003	Brief amici curiae of National Foreign Trade Council, Inc., et al. filed.
Oct 6 2003	Brief amici curiae of Washington Legal Foundation, et al. filed.
Oct 6 2003	Brief amici curiae of Lawyers Committee for Human Rights and Rutherford Institute filed.
Nov 12 2003	DISTRIBUTED for Conference of November 26, 2003.
Nov 12 2003	Reply of petitioner Jose Francisco Sosa filed. (Distributed)
Dec 1 2003	Petition GRANTED The cases are consolidated and a total of one hour is allotted for oral argument.
Dec 30 2003	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including January 23, 2004.
Jan 5 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner
Jan 12 2004	SET FOR ARGUMENT Tuesday, March 30, 2004.
Jan 16 2004	Motion to dispense with printing the joint appendix filed by petitioner (VIDED).
Jan 23 2004	Brief amici curiae of National Foreign Trade Council, Inc., et al. filed. VIDED.
Jan 23 2004	Brief amici curiae of Washington Legal Foundation, et al. filed. VIDED.
Jan 23 2004	Brief amicus curiae of National Association of Manufacturers filed. VIDED.
Jan 23 2004	Brief of petitioner Jose Francisco Sosa filed.
Jan 23 2004	Brief of respondent United States in support of petitioner filed.
Jan 23 2004	Brief amicus curiae of European Commission in Support of Neither party filed.
Jan 23 2004	Brief amici curiae of Governments of Commonwealth of Australia, et al. filed.
Jan 23 2004	Brief amici curiae of Professors of International Law, Federal Jurisdiction, and the Foreign Relations Law of the United States filed.
Jan 23 2004	Brief amicus curiae of Pacific Legal Foundation filed.
Jan 26 2004	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 30 2004	CIRCULATED.
Feb 20 2004	Consent to the filing of amicus briefs in support of either party received from counsel for

	the respondent.
Feb 26 2004	Brief amicus curiae of National and Foreign Legal Scholars filed. (Distributed)
Feb 27 2004	Brief of respondent Humberto Alvarez-Machain, et al. filed. (Distributed)
Feb 27 2004	Brief amicus curiae of Career Foreign Service Diplomats filed. (Distributed)
Feb 27 2004	Brief amicus curiae of International Jurists filed. (Distributed)
Feb 27 2004	Brief amici curiae of Center for Justice and Accountability, et al. filed. (Distributed)
Feb 27 2004	Brief amici curiae of International Human Rights Organizations and Religious Organizations filed. (Distributed)
Feb 27 2004	Brief amici curiae of Alien Friends Representing Hungarian Jews and Bougainvilleans Interests filed.
Feb 27 2004	Brief amici curiae of Women's Human Rights Organizations filed. (Distributed)
Feb 27 2004	Brief amici curiae of World Jewish Congress and American Jewish Committee filed. (Distributed)
Feb 27 2004	Brief amici curiae of Professors of Federal Jurisdiction and Legal History filed. (Distributed)
Feb 27 2004	Brief amici curiae of Presbyterian Church of Sudan, et al. filed. (Distributed)
Feb 27 2004	Brief amicus curiae of Corporate Social Responsibility filed. (Distributed)
Feb 27 2004	Brief amici curiae of Surviving Family Members of the Victims of the September 11, 2001 Terrorist Attacks filed. (Distributed)
Mar 5 2004	Motion for enlargement of time for oral argument and for divided argument filed by respondent the Solicitor General.
Mar 19 2004	Motion for enlargement of time for oral argument and for divided argument GRANTED.
Mar 23 2004	Reply of United States as respondent supporting petitioner filed. (Distributed)
Mar 23 2004	Reply of petitioner Jose Francisco Sosa filed. (Distributed)
Mar 30 2004	Argued. For petitioner United States: Paul D. Clement, Deputy Solicitor General, Department of Justice, Washington, D.C. For petitioner Sosa: Carter G. Phillips, Washington, D.C. For respondents: Paul L. Hoffman, Venice, Cal.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Alien Tort Act ("ATA"), 28 U.S.C. § 1350, provides as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The questions presented are:

1. Whether the ATA, is simply a grant of jurisdiction, or whether, in addition to granting jurisdiction, it provides a cause of action upon which aliens may sue for torts in violation of the law of nations or treaties of the United States.

2. If the ATA provides a cause of action, whether the actions it authorizes are limited to suits for violations of *jus cogens* norms of international law.

3. Whether a detention that lasts less than 24 hours, results in no physical harm to the detainee, and is undertaken by a private individual under instructions from senior United States law enforcement officials, constitutes a tort in violation of the law of nations actionable under the ATA.

PARTIES TO THE PROCEEDING

Petitioner José Francisco Sosa is a Mexican national resident in the United States under the federal witness protection program.

Petitioner's co-defendants in the proceedings below included the United States of America; Hector Bellerez, Bill Waters, Pete Gruden, Jack Lawn, and Antonio Garate-Bustamante, all individual employees and agents of the U.S. Drug Enforcement Agency for whom the United States was ultimately substituted as defendant; and five unnamed Mexican nationals in the federal witness protection program. They are all nominal respondents in this matter.

Respondent Humberto Alvarez-Machain is a Mexican national.

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The opinion of the *en banc* court of appeals (Pet. App. 1a-108a) is reported at 331 F.3d 604 (9th Cir. 2003). The now-vacated panel opinion of the court of appeals (Pet. App. 109a-139a) is reported at 266 F.3d 1045 (9th Cir. 2001).

The March 18, 1999 (Pet. App. 176a-219a) and May 18, 1999 (Pet. App. 172a-175a) orders and the Sept. 9, 1999 judgment (Pet. App. 140a-171a) of the district court for the Central District of California are unreported.

JURISDICTION

The judgment of the *en banc* court of appeals was entered on June 3, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, § 8, cl. 10 of the Constitution, which provides that:

> "The Congress shall have Power ... to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations ...."

2. Ch. 20, § 9 of An Act to Establish the Judicial Courts of the United States, 1 Stat. 73 (1789), now codified as amended at 28 U.S.C. § 1350, which provides that:

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

STATEMENT OF THE CASE

This case raises fundamentally important questions that directly affect the ability of the President and Congress to protect the Nation's security, to combat terrorism, and to control the Nation's foreign policy. In the decision below, the Ninth Circuit, sitting *en banc*, ruled that respondent Humberto Alvarez-Machain, a Mexican national who was indicted in the United States for his alleged participation in the kidnapping, torture, and murder of a U.S. Drug Enforcement Agency ("DEA") agent in Mexico, could recover damages under the Alien Tort Act ("ATA"), 28 U.S.C. § 1350, from petitioner José Francisco Sosa, a private Mexican citizen who, at the request of the DEA, helped apprehend, detain, and transport respondent from Mexico to Texas so that he could stand trial for his alleged crimes. In sustaining petitioner's tort liability for the service he rendered to a federal law enforcement agency, the majority below concluded that petitioner's participation in an arrest and detention that lasted less than 24 hours, that resulted in no physical harm to respondent, and that was conducted in accordance with directions from senior DEA officials, violated norms of customary international law.

As the United States recently explained, imposing liability on aliens who assist the federal government in its efforts to apprehend alleged murderers and other criminals on foreign soil inescapably impairs the government's anti-terrorism efforts, which frequently depend upon the assistance of foreign allies operating outside the United States. See Brief for the United States as *Amicus Curiae* at 3, 22, *Doe I* v. *Unocal Corp.*, Nos. 00-56603, 00-56628 (9th Cir. filed May 8, 2003) (en banc) ("U.S. *Unocal* Br."), Pet App. 228a-229a, 242a-243a (citing panel decision below). Moreover, the expansive interpretation of the ATA that the Ninth Circuit and two other courts of appeals have adopted interferes with the formulation and conduct of our Nation's foreign policy. The very act of passing factual, moral and legal judgments on events that occur outside our Nation's borders, and that often

involve exercises of foreign governmental authority, is fraught with foreign policy implications that courts lack the institutional competence to assess or to appreciate fully.

The untoward consequences of the decision below are directly attributable to the *en banc* majority's failure to adhere to interpretive principles that this Court adopted to ensure that federal courts do not assume responsibilities assigned to the political branches. The Ninth Circuit improperly recognized a cause of action under a statute that is singularly devoid of the "'rights-creating' language" necessary to justify the conclusion that Congress intended to confer such a right. *Alexander* v. *Sandoval*, 532 U.S. 275, 288 (2001). And the lower court has given extraterritorial effect to a statute that contains no evidence that Congress intended the law to apply to conduct occuring outside our borders. *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *superseded by statute on other grounds*, *Landsgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994). Compounding these errors, the majority below gave content to the amorphous cause of action it recognized by deriving enforceable legal norms from, among other things, a human rights convention the Senate has refused to ratify, and a non-self-executing treaty that the Senate and Executive Branch have agreed may not be relied upon by individuals in domestic court proceedings.

Not surprisingly, because judicial recognition of a private cause of action to enforce evolving international legal norms is wholly divorced from any congressional intent or guidance, the three courts of appeals that have implied such a cause of action have adopted different, and bewildering, liability standards. The resulting confusion enables aliens to sue not only allies that assist the United States in efforts to combat terrorism and crime, but has led to suits by aliens against the United States itself. It also has caused a burgeoning of lawsuits against U.S. companies that conduct business in countries targeted by activists for human rights abuses.

The Court should review the interpretation of the ATA embraced by the decision below and this Court should address the profoundly important legal questions this case raises for the country's national security, foreign policy, and economic interests.

A. Respondent's Arrest and Detention

In February 1985, DEA agent Enrique Camarena-Salazar was kidnapped, tortured, and murdered in Guadalajara, Mexico. Respondent was admittedly present at the location where those crimes occurred during the time Camarena was being held. In January 1990, a federal grand jury in Los Angeles indicted respondent for participating in the crimes against Camarena, and the District Court for the Central District of California issued a warrant for his arrest.

In early 1990, the Deputy Administrator of the DEA approved a plan to have Mexican nationals apprehend respondent in Mexico and deliver him to the United States to face trial. Petitioner was one of five or six Mexicans recruited on the DEA's behalf for that effort. Petitioner knew he was acting at the DEA's request and that the DEA would pay the expenses of the operation. The DEA clearly instructed that respondent was not to be harmed in any way during his arrest and transport to the United States.

On the evening of April 2, 1990, petitioner and others entered respondent's office in Guadalajara, Mexico and took him into their custody. Respondent offered no resistance, and was not maltreated in any way. He was held at a private residence, and then at a motel, until midday on April 3, 1990, when he was taken by taxi to an airport. Respondent was flown in the company of petitioner and others to El Paso, Texas, where he was delivered to DEA and Immigration and Naturalization Service ("INS") agents. Less than 24 hours elapsed between the time of his arrest and the handover in El Paso. At no time during that detention was respondent abused, injured or otherwise harmed.

B. Legal Proceedings

Facing trial in Los Angeles, respondent moved to dismiss the indictment for lack of jurisdiction, citing violations of the extradition treaty between the United States and Mexico. Ultimately, this Court determined that respondent's arrest did not violate that treaty, and that the manner of his arrest did not deprive the trial court of jurisdiction. See *United States* v. *Alvarez-Machain*, 504 U.S. 655, 669-70 (1992). It therefore remanded the case for trial. At that trial, the district court granted respondent's motion for a judgment of acquittal.

Respondent returned to Mexico, and in 1993 filed this civil action, relying upon a number of legal theories seeking damages against the United States, and against the DEA agents and Mexican nationals involved in his 1990 arrest and transportation to the United States. The United States was subsequently substituted for all the named individual defendants except petitioner, whom the district court deemed not to be a DEA employee.

Respondent's claims against petitioner were advanced under, *inter alia*, the ATA. Originally enacted as part of the Judiciary Act of 1789, the ATA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Following various proceedings and orders limiting respondent's claims against the several defendants, the district court entered summary judgment against petitioner with respect to (i) respondent's arrest and detention, and (ii) his transborder abduction. After a bench trial, the district court rejected respondent's remaining claims for assault and battery and intentional infliction of emotional distress, limited petitioner's liability for the detention and kidnapping claims to events in Mexico only, and awarded damages of $25,000 on the latter claims.

Petitioner appealed the judgment against him, and a panel of the court of appeals affirmed his liability on the ATA claims.[1] The Ninth Circuit then granted *en banc* review. On June 3, 2003, a deeply divided *en banc* court affirmed in part and reversed in part the judgment against petitioner.

The court first re-affirmed its prior conclusion, in *Hilao* v. *Estate of Marcos (In re Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467 (9th Cir. 1994), that the ATA provides not only jurisdiction but also a cause of action for tort suits alleging violations of international law. Pet. App. 10a. According to the court, moreover, such claims are not limited to alleged violations of *jus cogens* norms of international law—*i.e.*, those peremptory norms so broadly accepted that no derogation from them is permitted. *Id.* at 12a. Rather, the court held that a plaintiff need only allege violations of "'specific, universal and obligatory'" norms of customary international law. *Id.*

The court then held that, although state-sponsored transborder abduction does not violate international law, arbitrary arrest and detention does. Pet. App. 25a-26a. In deeming respondent's arrest arbitrary, the court concluded that it was not "pursuant to law" because the warrant issued for respondent's arrest did not authorize execution outside the United States. *Id.* at 26a (internal quotation marks omitted). Although the court acknowledged that the Controlled Substances Act authorized DEA agents to effect warrantless arrests on probable cause for suspected felony violations, and that the criminal statutes respondent had been charged with violating applied extraterritorially, the court rejected the

[1] Respondent also appealed from the substitution of the United States for the DEA agents on his ATA claims; the dismissal of his claims against the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346; and the limitation of his damages claim to harm suffered in Mexico. The appeals were consolidated before the panel and in the *en banc* proceeding. The discussion above, however, focuses on the court of appeals' decisions as they affect petitioner.

government's contention that DEA agents had authority to effect or direct a warrantless arrest in Mexico. Ironically, in so ruling, the court relied on the presumption against extraterritorial application of U.S. law—a presumption it ignored in construing the ATA. The court also concluded that there was no requirement that a detention be prolonged in order to violate international law.

The *en banc* court's decision was met with two strenuous dissents. Judge O'Scannlain, writing for himself and three others, explained that "there is simply no basis in our nation's law for this bewildering result, and the implications for our national security are so ominous that I must dissent." Pet. App. 73a. He objected that "by providing relief to Alvarez on his claim of prolonged arbitrary arrest, our court has in effect restricted the authority of our political branches ... in a way that finds no basis in our law." *Id.* at 74a, 88a. Judge Gould's separate dissent objected to the adjudication of the case as a whole, on the grounds that it presents "a nonjusticiable political question requiring scrutiny of an executive branch foreign policy decision" to act against a foreign national on foreign soil, with consequences for U.S. foreign relations. *Id.* at 97a.

REASONS FOR GRANTING THE PETITION

In the decision below, the Ninth Circuit decided at least three questions of law relating to the ATA that require this Court's review. First, the court re-affirmed its prior holding that the ATA is not solely a jurisdictional grant, but also provides a cause of action for tort suits alleging violations of international law or U.S. treaties. Second, the court held that ATA suits against private parties are not limited to violations of non-derogable, *jus cogens* international law norms—an issue on which the courts of appeals are divided. Third, the court held that an arbitrary arrest and detention of *any* duration is potentially actionable under the ATA. All three holdings are of great importance, as they harm the national

security, foreign policy, and economic interests of the United States.

I. THE ATA IS A GRANT OF JURISDICTION ONLY, AND CREATES NO CAUSE OF ACTION.

By its plain terms, the ATA does nothing more than confer jurisdiction on the district courts over particular types of civil actions. Nevertheless, since 1980, three courts of appeals, including the court below, have ruled that the ATA impliedly creates a cause of action that aliens can use to enforce evolving norms of international law, including norms that the political branches have chosen not to make binding. Although there is no square conflict among the lower courts over whether the ATA creates a cause of action, the United States and several judges of the D.C. Circuit have cogently explained that implying a cause of action under the ATA violates bedrock interpretive rules designed to ensure that courts do not usurp or interfere with duties assigned to the political branches. And the violation of those rules in this case demonstrates some of the significant evils that can arise when courts over-step their bounds: The decision below undermines ongoing anti-terrorism and anti-crime efforts abroad, and interferes with the conduct of foreign affairs. This Court should grant the petition to resolve the fundamentally important issue presented by this case.

A. The Second, Eleventh, And Ninth Circuits Have Implied A Cause Of Action Under The ATA With Little If Any Analysis Of Congress's Intent.

The ATA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATA was adopted, in substantially its current form, as part of the Judiciary Act of 1789. The statute was essentially ignored for 200 years following its enactment, serving as the basis for jurisdiction in only two cases between 1789 and 1975. See

IIT v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (citing *Bolchos* v. *Darrel*, 3 Fed. Cas. 810 (D.S.C. 1795) and *Abdul-Rahman Omar Adra* v. *Clift*, 195 F. Supp. 857 (D. Md. 1961)).

In 1980, however, the Second Circuit held in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), that the ATA could be used by aliens to sue for violations of international law. In its decision, the Second Circuit did not directly address whether the ATA created a cause of action. Instead, it assumed that the law of nations could be "'ascertained and administered'" as part of the federal common law. See *id.* at 885-87.

Several years later, in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), two judges of the D.C. Circuit sharply criticized the *Filartiga* decision. Judge Bork explained that the ATA was merely a grant of jurisdiction that did not provide a cause of action, and that separation-of-powers principles precluded implication of such a right. *Id.* at 799-801 (Bork, J., concurring). Implying a cause of action, he warned, "would raise substantial problems of judicial interference with nonjudicial functions, such as the conduct of foreign relations," *id.* at 804, and would force courts seeking to define an implied action without any congressional guidance to "act in the dark, and hence to do many things that, it is virtually certain, Congress did not intend." *Id.* at 815. Judge Robb likewise argued that *Filartiga* was "fundamentally at odds with the reality of the international structure and with the role of the United States courts within that structure," and that "intervention by courts into international affairs may very well rebound to the decisive disadvantage of the nation." *Id.* at 826 n.5 (Robb, J., concurring). Although Judge Edwards agreed with the *Filartiga* decision, he believed that the proper construction of the ATA was "an area of the law that cries out for clarification by the Supreme Court." *Id.* at 775 (Edwards, J., concurring).

This Court, however, declined to provide clarification at that time, see *Tel-Oren ex rel. Tel-Oren* v. *Libyan Arab Republic*, 470 U.S. 1003 (1985) (No. 83-2052) (denying petition for certiorari), and ten years later the Ninth Circuit expressly held for the first time that the ATA itself creates a cause of action. The court misread *Filartiga* as having so held[2] and simply followed the Second Circuit's supposed conclusion without independently analyzing the issue. See *Hilao* v. *Estate of Marcos (In re Ferdinand Marcos, Human Rights Litig.)*, 25 F.3d 1467 (9th Cir. 1994). Two years later, the Eleventh Circuit held that the ATA "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira* v. *Negewo*, 72 F.3d 844, 848 (11th Cir. 1996). In so ruling, the Eleventh Circuit relied principally on the Ninth Circuit's reasoning in *Hilao*, as well as language from the House Report accompanying the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73, which suggested that the ATA provides a cause of action. See 72 F.3d at 847-48 (citing H.R. Rep. No. 102-367, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84, 86).

Just months before the decision below issued, yet another concurring opinion in the D.C. Circuit offered a detailed critique of *Filartiga*'s analytical flaws. Addressing ATA claims brought by detainees at the Guantanamo Naval Base against the United States itself, Judge Randolph explained that recent scholarship cast grave doubt on any assumption that the First Congress intended to authorize a cause of action by aliens founded on customary international law. *Al Odah* v. *United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003)

[2] On the remand in *Filartiga* itself, the district court recognized that the Second Circuit had not addressed the issue, *see Filartiga* v. *Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984) ("We must now face the issue left open by the Court of Appeals, namely, the nature of the 'action' over which [the ATA] affords jurisdiction"), as Judge Bork did in *Tel-Oren*. *See* 726 F.2d at 819 (Bork, J., concurring) (*Filartiga* "did not address the issue of the existence of a cause of action" under the ATA).

(Randolph, J., concurring). He also noted that the practice of having federal courts "discover" such law "among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Id.* He likewise noted that the legislative history of the TVPA could not ratify *Filartiga*, and could shed no light on the intent the Congress that enacted the ATA in 1789. *Id.* at 1146.

In the course of the proceedings below, the Ninth Circuit twice addressed, and re-affirmed, its conclusion that the ATA provides both jurisdiction and a cause of action. First, on appeal of the partial dismissal of respondent's complaint, the Ninth Circuit rejected the argument that the ATA is simply a grant of jurisdiction. *Alvarez-Machain* v. *United States*, 107 F.3d 696, 703 (9th Cir. 1996). It concluded that the legislative history of the TVPA buttressed its prior conclusion, in *Hilao*, that the ATA provides a cause of action. *Id.* Second, the *en banc* majority *sua sponte* expressly re-affirmed its holding in *Hilao*. Pet. App. 10a. Neither the panel nor the *en banc* majority, however, addressed any of the criticisms that members of the D.C. Circuit have leveled at the Ninth Circuit's implication of a cause of action under the ATA, nor any of the criticisms advanced by scholars.

Because the issue presented was both pressed and passed on below, and because, as petitioner shows in detail below, "the availability of a right of action" under the ATA is an issue of great "importance to the administration of federal law," it is properly presented in this case. *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); see also *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991).[3]

[3] In addition, because the petition raises two other issues independently worthy of this Court's review, and because the issue of whether the ATA provides a cause of action is logically subsumed within both of these

B. Implying A Cause Of Action Under The ATA Violates Several Interpretive Rules Designed To Prevent Judicial Interference With The Political Branches' Conduct Of Foreign Affairs.

As members of the D.C. Circuit and, more recently, the United States itself have explained, implication of a right of action under the ATA is flatly inconsistent with several interpretive rules designed to prevent the very type of judicial interference with political branch functions that the decision below indisputably permits.

First, implying a cause of action violates this Court's admonition that it is for Congress, not the courts, to create private rights of action. *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). As the United States has explained, the ATA "does not purport to create any particular statutory *rights*, much less rights that in turn could be interpreted to confer a private right of action for money damages." U.S. *Unocal* Br. at 13, Pet. App. 236a. Indeed, far from employing the type of "'rights-creating' language so critical" to implication of a cause of action, *Alexander*, 532 U.S. at 288, the ATA is phrased in strictly jurisdictional terms. It grants district courts "original *jurisdiction* of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added).

The strictly jurisdictional nature of the Act is confirmed by its original language and its placement in the Judiciary Act of 1789. As originally enacted, the statute granted "the district courts .... *cognizance*, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (emphasis added). The Judiciary Act

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issues, the issue is properly presented. *See Missouri* v. *Jenkins*, 515 U.S. 70, 84-85 (1995); *Procunier* v. *Naverette*, 434 U.S. 555, 560 n.6 (1978).

of 1789 established the federal courts themselves and conferred on them specific grants of jurisdiction. The original language of the ATA appeared as a clause in Section 9 of the 1789 Judiciary Act, next to provisions granting the new federal courts "cognizance," or jurisdiction, over crimes on the high seas, actions in admiralty, and suits against consuls. *Id.* Both the familiar interpretive principle that terms and phrases are known by the linguistic company they keep, see *e.g.*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995); *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 576 (1995), and the elemental task the First Congress was undertaking—creating a federal judiciary from wholecloth—confirm that, like the provisions surrounding it, the ATA was simply a grant of jurisdiction.

Although the ATA was not accompanied by any legislative history, historical research confirms the statute's limited function. In particular, scholars have uncovered evidence indicating that the ATA was passed in response to two high profile cases involving assaults upon foreign ambassadors on domestic soil. See William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-94 (1986). Because, at the time, a "denial of justice" to one's citizens abroad was a justification for a war of reprisal, it was necessary to ensure that the new federal courts had jurisdiction over a claim brought by an ambassador, or other alien, seeking redress for a violation of any principles of the "law of nations" incorporated into any federal statutes or "treaties of the United States."[4]

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[4] Another scholar has marshalled evidence indicating that the ATA was passed to ensure that the grant of exclusive admiralty jurisdiction to the new federal courts did not deprive State courts of jurisdiction over cases in which an alien sued not for the return of a prize ship, but for reparations for damages caused by the ship's seizure. *See* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445 (1995). Even under this competing view, of course, the ATA remains a purely jurisdictional grant of authority.

In short, the ATA is not only utterly devoid of any "'rights-creating' language," it is a type of jurisdiction-vesting provision that this Court has expressly held does *not* create a cause of action. See *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951).

Moreover, the violation of separation-of-powers principles that results from implication of a cause of action under the ATA is greatly compounded by the fact that, in order to give content to that cause of action, the court below usurped the power and responsibility of the political branches to decide which norms of international law should be binding. In concluding that arbitrary arrest and detention is a violation of customary international law, the lower court relied on, among other things, the American Convention on Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), and the Universal Declaration of Human Rights. Pet. App. 25a-26a & n.17. The U.S. Senate, however, has *refused to ratify* the American Convention on Human Rights. And while it has ratified the ICCPR, the Senate and the Executive Branch have expressly agreed that this treaty is not self-executing and may not be relied upon by individuals in domestic court proceedings. See S. Exec. Rep. No. 102-23, at 9, 19, 23 (1992); 138 Cong. Rec. S4781, S4783-84 (daily ed. Apr. 2, 1992). Similarly, the Universal Declaration of Human Rights is a *non-binding* resolution of the United Nations General Assembly. By purporting to derive "'specific, universal and obligatory'" norms from these documents, Pet. App. 12a, the lower court plainly usurped the prerogative of the political branches to decide whether certain norms of international law should be binding and enforceable in U.S. courts.

Second, implication of a cause of action under the ATA violates the principle that domestic laws are not to be given extraterritorial effect unless Congress has expressed such an intent in the statute itself. See, *e.g.*, *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991). That venerable principle,

which is as old as the ATA itself, is designed "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Id.* at 248. It is particularly inconceivable that the representatives of a new and still fragile Nation, whose first President would soon famously warn against foreign entanglements, President George Washington, Farewell Address (Sept. 19, 1796), chose, in one of their first legislative acts, to pass a law authorizing the new federal judiciary to pass factual, moral and legal judgments on conduct occurring entirely outside the Nation's borders in disputes between non-U.S. citizens. That such a judicial role was unfathomable to the founding generation is made clear by John Marshall's oft-quoted statement, made ten years after adoption of the ATA, that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 6 Annals of Cong. 613 (1800).

The Ninth Circuit's unwillingness to abide by these interpretive precepts thus conflicts with the clear directives of this Court and causes deeply disturbing foreign policy consequences that warrant this Court's attention.

C. An Implied Cause Of Action Under The ATA Interferes With The Political Branches' Ability To Conduct Foreign Affairs.

The majority below recognized that the case before it "implicates our country's relations with Mexico, ... an important ally and trading partner," and that it is not the province of the courts "to address the policy and diplomatic issues associated with transborder kidnapping." Pet. App. 3a. The majority mistakenly believed, however, that by deciding the supposedly "narrow question" of "whether [respondent] has a remedy at law under the ATCA," *id.*, it could somehow side-step "the legal quagmire" surrounding the question of terrorist-apprehension, as well as a host of other thorny foreign relations problems. *Id.* But implication of a cause of action under the ATA is by no means a "narrow question."

To the contrary, the lower court's resolution of that issue inescapably interferes with critical aspects of our Nation's foreign relations. And that interference necessitates review by this Court.

1. Interference with Efforts to Promote and Protect National Security.

As Judge O'Scannlain explained, by holding "that a foreign-national criminal who was apprehended abroad pursuant to a legally valid indictment is entitled to sue" aliens who assist federal agencies in such captures, the decision below "le[aves] the door open for the objects of our international war on terrorism to do the same." Pet. App. 72a (O'Scannlain, J., dissenting); see also *id.* at 104a-105a, 107a n.7 (Gould, J., dissenting). The assistance of foreign agents operating on foreign soil is vital to the Nation's efforts to fight both international terrorism and international crime. For example, the United States might request that a Middle East ally detain a suspected terrorist for questioning. Under the decision below, however, the U.S. officials who convey the request, the foreign officials who execute it, and any cooperating individuals who participate in the brief detention, expose themselves to the burdens of defending their actions in distant courts and to liability for money damages.

These risks are starkly illustrated by this case. Acting at the direction of senior DEA officials who had obtained a valid indictment against respondent and a valid warrant for his arrest, petitioner was ultimately held liable based on a highly technical interpretation of the statutory authority of DEA agents to engage in extraterritorial enforcement activities. This imposition of liability can only deter other would-be assistants in the wars on terrorism and international crime. Indeed, by demonstrating that even the participation and assurances of senior officials is no guarantee against civil liability, the decision below will inevitably make it harder for law enforcement and intelligence agents to persuade foreigners to aid this country.

In the complete absence of any evidence that Congress intended to authorize such interference with national security efforts, implication of such a cause of action does great violence to core notions of separation of powers. As this Court has explained, decisions affecting national security

> are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which have long been held to belong in the domain of political power not subject to judicial intrusion.

Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Accordingly, any decision to permit aliens to bring actions in U.S. courts of the type respondent successfully prosecuted below should be made by "those directly responsible to the people whose welfare [such actions] advance or imperil," not by unelected judges with no expertise in foreign relations or counterterrorism efforts. This Court should grant the petition to eliminate the "ominous" "implications for our national security" caused by the decision below. Pet. App. 73a (O'Scannlain, J., dissenting); *id.* at 104a n.5 (Gould, J., dissenting).

2. Interference with the Conduct of Foreign Affairs.

Although interference with anti-terrorism efforts is the most stark consequence of the lower court's implication of a cause of action, it is by no means the only significant impediment to the conduct of foreign relations that the decision below entails. Suits brought by aliens in U.S. courts against foreign governments, their agents or their citizens inevitably create international frictions. At a minimum, these frictions can complicate diplomatic efforts and relations. And in some

cases, they can affirmatively undermine our Nation's foreign policy objectives.

In two recent cases brought under the ATA, senior officials of foreign governments have expressed anger and resentment at the very existence of these suits. See, *e.g.*, Letter from Soemadi D.M. Brotodiningrat, Ambassador of Indonesia to the United States, to Richard Armitage, Deputy Secretary, U.S. Department of State (July 15, 2002), *filed in Doe I* v. *ExxonMobil Corp.*, No. 01cv1357 (D.D.C. document filed Aug. 1, 2002) (expressing concern regarding ATA litigation); South African President Thabo Mbeki, Statement to the National Houses of Parliament and the Nation (Apr. 15, 2003), *available at* http://www.anc.org.za/ancdocs/history/mbeki/2003/tm0415.html ("[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation."). These reactions, in turn, cause diplomatic headaches, by forcing the Executive Branch either to oppose suits on foreign policy and immunity grounds and face the wrath of public opinion, or to stay silent and damage its position with foreign nations.[5]

In some instances, moreover, such suits can affirmatively impair pursuit of U.S. foreign policy goals. Last year, for example, the Department of State's Legal Adviser advised a district judge that adjudication of an ATA case would "risk a potentially serious adverse impact on significant interests of the United States." Letter of William H. Taft, IV, Legal Adviser, Department of State, to Hon. Louis F. Oberdorfer 1 (July 29, 2002), *filed in Doe I* v. *ExxonMobil Corp.*, No.

[5] Indeed, for similar political reasons, the Belgian Parliament recently scaled back a law similar to the ATA in order to prevent political and diplomatic conflicts. *See Six NGOs urge EU to consider applying universal jurisdiction*, Agence Eur., Aug. 5, 2003, *available at* 2003 WL 58352344.

01cv1357 (D.D.C. document filed Aug. 1, 2002), Pet. App. 250a. Explaining that "the government and people of Indonesia react most negatively to any perceived intrusion into areas of Indonesian sovereignty," the Legal Adviser opined that adjudication of the suit "could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform." *Id.* at 2-3, Pet. App. 251a-252a.

Beyond these obvious harms, the Ninth Circuit's practice of looking to non-binding U.S. treaties and international agreements to give content to the cause of action it has implied impermissibly complicates and interferes with the exercise of the Executive Branch foreign affairs powers. For any number of foreign relations purposes, the United States may desire to, and routinely does, enter into non-self-executing treaties without simultaneously creating a private cause of action for foreign litigants. Yet the practice of looking to such documents in order to give content to an implied cause of action forces Executive officials to weigh the additional "possibility of tort lawsuits by foreign nationals seeking punitive damages in their own nation's courts." Pet. App. 103a (Gould, J., dissenting).

This same practice interferes with the ability of the political branches to help shape the governing standards of customary international law. Because those standards are derived from the "general and consistent practice of states followed by them from a sense of legal obligation," Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987) ("Restatement"), Congress and the President can, through acquiescence or non-acquiescence, influence whether a particular norm achieves the level of general assent necessary to become binding as customary international law. But, by purporting to derive such standards from sources such as non-binding United Nations General Assembly resolutions and the writings of law professors, the Ninth Circuit both

dilutes and usurps the constitutional authority of the political branches to shape these norms. See *United States* v. *Yousef*, 327 F.3d 56, 102 (2d Cir. 2003) (notion that "professors of international law enjoy a special competence to prescribe the nature of customary international law wholly unmoored from legitimating territorial or national responsibilities, the interests and practices of States, or (in countries such as ours) the processes of democratic consent—may not be unique, but it is certainly without merit") (footnote omitted), *petition for cert. filed*, No. 03-5976 (U.S. Aug. 16, 2003); *Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring) (reliance on nongovernmental influences "is anti-democratic and at odds with principles of separation of powers").

Finally, the Ninth Circuit's practice harms U.S. business interests operating abroad, thereby undermining the ability of the political branches to use economic leverage to advance foreign policy goals. As this Court has recognized, the President can use the ability to permit or prohibit U.S. investment abroad to induce cooperation from repressive or hostile regimes. See generally *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 375-76 (2000). Recently, however, plaintiffs have begun to use the ATA to seek to hold multinational companies doing business in countries where human rights abuses occur liable for the state actors' wrongdoing. See, *e.g.*, *Ntsebeza* v. *Citigroup Inc.*, 1:02cv4712 (S.D.N.Y. filed June 19, 2002) (claims against corporations conducting business in South Africa during apartheid era). U.S. businesses operating overseas thus face new, and undefined liability based on evolving norms of customary international law. See Jenna Greene, *Gathering Storm*, Legal Times, July 21, 2003, at 1 ("'[i]f you're a business and you haven't yet been sued under this law, don't worry, you will be'"). This risk not only places U.S. businesses at a competitive disadvantage vis-à-vis foreign competitors who operate exclusively overseas free from the risk of suit in U.S. courts, it could chill or curtail U.S.

investment in the very countries where the promise of such investment, or the threat of prohibiting it, can be a powerful diplomatic tool.

Again, in the absence of clear evidence that Congress intended such results, it is improper to imply a cause of action with such untoward consequences for the conduct of the Nation's foreign policy. The Ninth Circuit's contrary judgment warrants this Court's plenary review.

* * * *

The foregoing harms to the Nation's security, to the conduct of the Nation's foreign affairs, and to fundamental separation-of-power principles are significant and immediate. Nearly 20 years ago, Judge Edwards argued that the proper construction of the ATA was an issue "that cries out for clarification by the Supreme Court." *Tel-Oren*, 726 F.2d at 775. The intervening two decades have proven true Judge Bork's prediction that, in the absence of such clarification, courts would "do many things that, it is virtually certain, Congress did not intend." *Id.* at 815. Further litigation in the lower courts will not bring any needed clarity; indeed, it is unlikely that ATA cases will even be litigated in most circuits, and plaintiffs have every incentive to bring future actions in the three circuits that have implied causes of action. Accordingly, the Court should grant the petition to resolve the fundamentally important question of whether the ATA is simply a grant of jursidiction from which no cause of action can be implied.

II. THE COURTS OF APPEALS ARE DIVIDED ON THE PROPER REACH OF THE ATA.

In the decision below, the Ninth Circuit adopted a standard of liability for the cause of action it has implied that squarely conflicts with the liability standard employed by the Second Circuit. The Ninth Circuit's standard, moreover, is an indeterminate one that is judicially unmanageable and will only spawn confusion and uncertainty in the lower courts.

Accordingly, even if a cause of action can properly be implied under the ATA, this Court should review the decision below to resolve the conflict among the courts of appeals as to the proper standard of liability in such actions.

A. The Ninth Circuit Has Adopted A Standard Of Liability Under The ATA That Squarely Conflicts With The Second Circuit's Standard.

In the lower courts, litigants have advanced two distinct standards of liability for actions brought under the ATA. The Second Circuit permits imposition of liability against private individuals only for violations of *jus cogens* norms. In the decision below, however, the Ninth Circuit rejected that approach in favor of an indeterminate category consisting of violations of some, though not necessarily all, norms of customary international law.

Jus cogens norms are offenses that are universally condemned and prohibited for all nations. States are bound by these norms even if they object to or dissent from them, and cannot form contracts or agreements that would violate them. Thus, *jus cogens* norms are rules of international law which, once established, cannot be set aside by treaty or practice. See, *e.g.*, Ian Brownlie, *Principles of Public International Law* 514 (4th ed. 1990); *Siderman de Blake* v. *Argentina*, 965 F.2d 699, 715 (9th Cir. 1992); *Committee of U.S. Citizens Living in Nicar.* v. *Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *Yousef*, 327 F.3d at 94-95. The international law offenses most consistently listed in the *jus cogens* category include: aggressive war/use of force; genocide; systematic racial discrimination; crimes against humanity; slavery or slave trade; murder or causing the disappearance of individuals; summary execution; torture or other cruel, inhuman or degrading treatment; and piracy. Brownlie, *supra*, at 513; Restatement § 102 n.6 and § 702 cmt. n; *U.S. Citizens Living in Nicar.*, 859 F.2d at 941-42.

By contrast, "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2); *U.S. Citizens Living in Nicar.*, 859 F.2d at 940. A rule must achieve general assent before it becomes binding on nations as customary international law. In other words, customary international law is made up of the offenses that the international community, through practice, has prohibited. It is to be ascertained "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law." *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

In *Kadic* v. *Karadzic*, 70 F.3d 232, 239-40, 244 (2d Cir. 1995), the Second Circuit first held that private parties can be held liable for certain violations of international law, but limited its holding to *jus cogens* violations. Specifically, it listed only piracy, genocide and war crimes—what it called violations of "universal concern"—as offenses for which a private person may be held liable under the ATA. These offenses of universal concern are, of course, core *jus cogens* violations.[6] *Id.* at 240.[7]

Second Circuit practice and precedents subsequent to *Kadic* confirm that court's rule that private persons are only liable under the ATA if they violate *jus cogens* norms. For

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[6] Although the *Kadic* court did not specifically use the term "*jus cogens*," its holding clearly is limited to those norms. The actionable offenses identified in *Kadic* are those most consistently listed as violations of *jus cogens* norms. *See, e.g.*, Brownlie, *supra*, at 513; Restatement § 102 n.6, § 702 cmt. n and § 404 n.1; *U. S. Citizens Living in Nicar.*, 859 F.2d at 941-42. In addition, the court emphasized that its holding was limited only to the small number of actions of "'universal concern'" listed in § 404 of the Restatement. *Kadic*, 70 F.3d at 240.

[7] The *Kadic* court opined by contrast that two other offenses of universal concern, torture and summary execution, would be actionable under the ATA only when committed by state officials or under color of state authority. *Kadic*, 70 F.3d at 243.

example, in *Bigio* v. *Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000), the Second Circuit again emphasized that private persons are liable under the ATA only if their conduct falls within the handful of international law violations that are of "'universal concern.'" *Id.* at 447-48. In the Second Circuit's view, such offenses would include only "'piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism'"—acts that are consistently identified as *jus cogens* violations. *Id.* at 448 (quoting Restatement § 404). The *Bigio* court held that the discriminatory expropriation of property at issue in that case, "[h]owever reprehensible," was not an act of universal concern listed in § 404 of the Restatement. *Id.* The district courts of the Second Circuit have recognized and followed this rule. See, *e.g.*, *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F.Supp.2d 289, 312-13 (S.D.N.Y. 2003).[8]

In the decision below, however, the Ninth Circuit rejected this approach, stating that "the fact that a violation of this subcategory of international norms is *sufficient* to warrant an actionable claim under the ATCA does not render it *necessary*." Pet. App. 12a. Although it adhered to its statements in prior cases that only violations of "specific, universal, and obligatory" international norms are actionable

[8] Although the Fifth Circuit has not decided whether the ATA provides a cause of action, it has indicated that only violations of *jus cogens* norms could be actionable under the ATA. *See Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (ATA "'applies only to shockingly egregious violations of universally recognized principles of international law'") (quoting *Zapata* v. *Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam)). *See also Tel-Oren*, 726 F.2d at 781 (Edwards, J. concurring) ("a handful of heinous actions—each of which violates definable, universal and obligatory norms," are actionable under the ATA); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (the ATA "may conceivably" cover certain acts such as piracy and assaults upon ambassadors, but does not reach private parties who may have supported the Contra forces fighting against the government of Nicaragua).

under the ATA—terminology that appears to echo the classic language of *jus cogens* jurisprudence—the court below rejected a *jus cogens* limitation on the ground that "[t]he notion of *jus cogens* norms was not part of the legal landscape when Congress enacted the ATCA in 1789." *Id.* at 13a. The Ninth Circuit thus held that respondent had a remedy under the ATA for his arbitrary arrest and detention, notwithstanding that arbitrary arrest and detention does not violate *jus cogens* unless the detention is prolonged.[9] The conflict between the liability standards employed in the Second and Ninth Circuits could not be clearer.

B. ATA Liability For Violations Of Customary International Law Is Judicially Unmanageable.

Stripped of any *jus cogens* limitation, the Ninth Circuit's approach to identifying actionable offenses is vague, and relies on terminology that fits imperfectly in the international law lexicon. This liability standard is judicially unmanageable, and will result in significant uncertainty for litigants.

In light of the foreign policy implications of holding foreign citizens and foreign government officials liable for violations of customary international law, it is critically important that, if courts impose such liability at all, they undertake an exacting inquiry to identify the relevant binding norms. As the Fifth Circuit has observed, however, the "question of defining 'the law of nations' is a confusing one which is hotly debated, chiefly among academics." *Carmichael* v. *United Techs. Corp.*, 835 F.2d 109, 113 (5th Cir. 1988). Because these rules are evolving and state practice may be inconsistent, it may not always be possible to ascertain (i) whether there is a general recognition among countries that specific acts are prohibited and (ii) whether

[9] *See* Restatement § 702 cmt. n; *Tel-Oren*, 726 F.2d at 781 (Edwards, J. concurring). *But see* Brownlie, *supra*, at 513; *Siderman de Blake*, 965 F.2d at 715-17.

there actually is a corresponding practice by governments demonstrating compliance with the prohibition.[10]

Indeed, a court must be sure that rules are settled as recognized through the general assent of civilized nations. *The Paquete Habana*, 175 U.S. 677, 694 (1900). It is not enough to consult the writings of international scholars, or hortatory declarations and treaty preambles, to divine whether a given ideal or aspiration is in fact part of customary international *law*. In fact, these sources are secondary at best. *Yousef*, 327 F.3d at 99-103; Anthony D'Amato, *Trashing Customary International Law*, 81 Am. J. Int'l L. 101, 102 (1987). Instead, a court must start with, and thoroughly examine, the actual practices of states, taking into account not only past practice, but also whether practices have changed over time to take account of new state interests. *Yousef*, 327 F.3d at 99-103; D'Amato, *supra*, at 104.[11] Likewise, a court must distinguish between practices *accepted as law*, and uniform practices or usages that are continued merely out of habit or politeness. Brownlie, *supra*, at 5, 7-9; Restatement § 102(2); *Yousef*, 327 F.3d at 91 n.24, 92.

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[10] For example, the U.N.'s "Standard Minimum Rules for the Treatment of Prisoners" sets forth one standard as to how prisoners should be treated. However, as numerous human rights reports show, this standard is not reflected in state "practice," and prisoners are treated far more harshly around the world. *See, e.g.*, Human Rights Watch, *World Report 2002: Prisons* (2002), *available at* http://www.hrw.org/wr2k2/prisons.html.

[11] The Second Circuit in *Yousef* and Judge O'Scannlain in his dissent here have both suggested that if the United States has not embraced or abided by an international norm in practice, it cannot be deemed "universal," and thus is not properly considered a *bona fide* norm of customary international law. *See Yousef*, 327 F.3d at 92 n.25; Pet. App. 76a. Other courts, however, have perceived no such limitation. *See, e.g.*, Pet. App. 87 n.15; *cf. Doe I* v. *Unocal Corp.*, Nos. 00-56603 et al., 2002 WL 31063976, at *12-*13 (9th Cir. Sept. 18, 2002) (adopting liability standard developed by international tribunals in reliance on, *inter alia*, Statute of International Criminal Court, which United States has refused to join), *vacated by* 2003 WL 359787 (9th Cir. Feb. 14, 2003) (granting rehearing en banc).; *see also* discussion *infra* at Part III.

These difficulties raise serious questions as to whether courts even possess the competence to determine whether an alleged norm of customary international law actually exists. The uncertainty engendered by such an exercise will foster the already burgeoning efforts of well-meaning plaintiffs to fashion customary international law claims against U.S. businesses that operate in countries with poor human rights track records, to the ultimate detriment of U.S. economic interests.

* * * *

In short, review by this Court is necessary to reconcile the split of authority among the courts of appeal. Absent such clarification, ATA plaintiffs will surely begin to seek out the most hospitable fora—the courts in the Ninth Circuit—in which to advance their ever-multiplying claims under that court's vague and indeterminate liability standard.

III. RESPONDENT'S ARREST AND DETENTION DID NOT VIOLATE CUSTOMARY INTERNATIONAL LAW.

Finally, this Court should grant the petition and review the lower court's determination that petitioner's arrest and detention of respondent violated customary international law. That holding, which rests on the lower court's erroneous resolution of two legal issues, seriously undermines the federal government's anti-crime and anti-terrorism efforts. Accordingly, that holding independently warrants plenary review.

A. Respondent's Arrest Was Not Arbitrary.

The lower court's determination that respondent's arrest was arbitrary hinged on its conclusion that DEA agents lack authority to conduct extraterritorial enforcement efforts. As the Ninth Circuit itself recognized, the statutes respondent was charged with violating applied extraterritorially, and DEA agents have statutory authority to make warrantless

arrests on probable cause for suspected felony violations. Pet. App. 35a-36a (citing 21 U.S.C. § 878(a)(3)). Thus, despite the fact that the statute authorizes warrantless arrests for suspected felony violations that can occur outside U.S. borders, the lower court concluded that the presumption against extraterritorial application foreclosed the exercise of this arrest power in Mexico.

In *United States* v. *Bowman*, 260 U.S. 94 (1922), however, this Court held that the requirement that Congress disclose a statute's extraterritorial application in the statutory text itself "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." *Id.* at 98. That same principle demonstrates the propriety of the arrest at issue in this case. Just as the government's authority to forbid the kidnap, torture and murder of DEA agents does not logically depend on the locus of those acts, so too authorization to make a warrantless arrest based on probable cause for suspected violation of those prohibitions is not logically restricted to the government's jurisdiction over the locus of the acts.

Nor does an authorization to conduct extraterritorial enforcement of criminal laws that themselves have extraterritorial application "eviscerate," Pet. App. 37a, the presumption against such application, or suggest that Congress has "turned a blind eye to the interests of equal sovereigns and the potential violations of international law." *Id.* at 41a. Unlike the ATA, which, under the Ninth Circuit's view, can be enforced by private persons, DEA's arrest authority is under the control, ultimately, of the President. Because the President is responsible both for the conduct of the Nation's foreign affairs and its law enforcement activities, Congress can reasonably expect that he will balance these

interests appropriately, and will not permit authorizations to perform arrests on foreign soil to damage foreign relations.

B. Respondent's Arrest Was Not Prolonged.

Finally, the lower court erred in concluding that an arrest need not be "prolonged" in order to violate customary international law. As noted above, in reaching this conclusion, the lower court improperly relied on a non-binding resolution of the United Nations General Assembly, an unratified treaty, and a non-self-executing treaty. See *supra* at 14. For the numerous reasons discussed above, these documents cannot serve as evidence that the United States has, through its political branches, bound itself to the standards identified in these instruments. Indeed, the lower court's contrary conclusion is a plainly impermissible usurpation of authority assigned to the executive and legislative branches.

Moreover, as the lower court itself acknowledged, the Restatement refers to "'*prolonged* arbitrary detention'" as a customary law violation. Pet. App. 28a (citing Restatement § 702) (emphasis added). The lower court's citation to a single comment to the Restatement that "implies" that a detention need not be prolonged to constitute such a violation, *id.*, simply underscores the fundamental analytical flaws in the opinion discussed above. The comment states that a "single, brief, arbitrary detention by an official of a state party to one of the principal international agreements *might* violate *that agreement*." Restatement § 702 cmt. h (emphasis added). The *possible* violation of an international agreement hardly establishes the actual practices of nations with respect to detentions. And in all events, the agreements the lower court identified are not binding or self-executing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 99-56762, 99-56880

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; HECTOR BERELLEZ; BILL WATERS; PETE GRUDEN; JACK LAWN; ANTONIO GARATE-BUSTAMANTE; FRANCISCO SOSA, and five unnamed Mexican nationals currently in the federal witness protection program,
Defendants-Appellees,

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,

v.

FRANCISCO SOSA, and five unnamed Mexican nationals currently in the federal witness protection program,
Defendant Appellant.

Argued and Submitted June 11, 2001.
Panel Opinion Filed Sept. 11, 2001.
Rehearing En Banc Granted March 20, 2002.
Argued and Submitted En Banc June 18, 2002.
Filed June 3, 2003.

Appeal from the United States District Court for the Central District of California, Stephen V. Wilson, District Judge, Presiding. D.C. No. CV-93-04072- SVW-06.

Before SCHROEDER, Chief Judge, GOODWIN, O'SCANNLAIN, RYMER, KLEINFELD, THOMAS, McKEOWN, FISHER, GOULD, PAEZ and TALLMAN, Circuit Judges.

Opinion by Judge McKEOWN; Concurrence by Judge FISHER; Dissent by Judge O'SCANNLAIN; Dissent by Judge GOULD.

OPINION McKEOWN, Circuit Judge.

We must decide whether the forcible, transborder abduction of a Mexican national, Humberto Alvarez-Machain ("Alvarez"), by Mexican civilians at the behest of the Drug Enforcement Administration (the "DEA") gives rise to a civil claim under United States law. In an earlier, related proceeding, the Supreme Court acknowledged, without deciding, that Alvarez "may be correct" in asserting that his abduction was "shocking" and "in violation of general international law principles." *United States v. Alvarez-Machain,* 504 U.S. 655, 669, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). We now address the question left unanswered—whether there was a "violation of the law of nations," a predicate to federal court jurisdiction under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. We also consider whether the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b)(1), 2671-2680, provides a remedy for this cross-border abduction.

In 1990, Mexican citizens acting on behalf of the DEA kidnapped Alvarez from his office in Mexico for his alleged involvement in the kidnapping and murder of an American DEA agent in Mexico. The arrest of Alvarez took place without an extradition request by the United States, without the involvement of the Mexican judiciary or law enforcement, and under protest by Mexico. Alvarez was brought to the United States, stood trial on criminal charges, and was acquitted. He then sued his former captors, the United States,

and the DEA agents, asserting a panoply of common law and constitutional torts arising from his abduction.

This case, which has been litigated in one form or another for more than a decade, involves important issues of international law and sovereignty. It also implicates our country's relations with Mexico, our neighbor to the South and an important ally and trading partner. The questions it raises, particularly with regard to the Executive's power to carry out law enforcement operations abroad, perhaps resonate to a broader audience today than when the case began. In the midst of contemporary anxiety about the struggle against global terrorism, there is a natural concern about the reach and limitations of our political branches in bringing international criminals to justice.

But we need not delve into the legal quagmire of apprehending terrorists or even resolve many of the complex issues spawned by this international abduction dispute. Nor is it within our province to address the policy and diplomatic issues associated with transborder kidnapping. Rather, this appeal presents only the narrow question whether Alvarez has a remedy at law under the ATCA and the FTCA for a violation of the "law of nations."

More precisely, we must determine the statutory authority of a single federal agency-the DEA-to make a warrantless arrest outside the borders of the United States and, if the agency lacks that authority, whether Alvarez has a remedy at law under the ATCA or the FTCA. After a careful review of the relevant statutes, we conclude that the DEA had no authority to effect Alvarez's arrest and detention in Mexico, and that he may seek relief in federal court.

Whatever the contours of the powers of the political branches during wartime or in matters of national security, the exercise of those powers in the combat against terrorism are not implicated in our analysis. Our holding today, that

Alvarez may pursue civil remedies for actions taken against him more than ten years ago by the DEA and its agents, is a limited one. It does not speak to the authority of other enforcement agencies or the military, nor to the capacity of the Executive to detain terrorists or other fugitives under circumstances that may implicate our national security interests. The Fourth Circuit recently underscored this distinction when it recognized, in approving the detention of an American citizen captured abroad and designated as an "enemy combatant," that it was "not . . . dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers" but rather "with the executive's assertion of its power to detain under the war powers of Article II." *Hamdi v. Rumsfeld,* 316 F.3d 450, 473 (4th Cir.2003). We, by contrast, are dealing with the former, not the latter.

BACKGROUND

In February 1985, DEA Special Agent Enrique Camarena-Salazar ("Camarena") was abducted and brought to a house in Guadalajara, Mexico, where he was tortured and murdered. Alvarez, a Mexican citizen and a medical doctor who practices in Guadalajara, was present at the house.

Five years after Camarena's death, a federal grand jury in Los Angeles indicted Alvarez for participating in the scheme, and the United States District Court for the Central District of California issued a warrant for his arrest. The United States negotiated with Mexican government officials to take custody of Alvarez, but made no formal request to extradite him. Instead, DEA headquarters in Washington, D.C., approved the use of Mexican nationals, who were not affiliated with either government, to arrest Alvarez in Mexico and to bring him to the United States.

The DEA agent in charge of the Camarena murder investigation, Hector Berellez ("Berellez"), with the approval

of his superiors in Los Angeles and Washington, hired Antonio Garate-Bustamante ("Garate"), a Mexican citizen and DEA operative, to contact Mexican nationals who could help apprehend Alvarez. Through a Mexican intermediary, Ignacio Barragan ("Barragan"), Garate arranged for Jose Francisco Sosa ("Sosa"), a former Mexican policeman, to participate in Alvarez's apprehension. Barragan told Sosa that the DEA had obtained a warrant for Alvarez's arrest, would pay the expenses of the arrest operation, and, if the operation was successful, would recommend Sosa for a position with the Mexican Attorney General's Office.

On April 2, 1990, Sosa and others abducted Alvarez from his office and held him overnight at a motel. The next day, they flew him by private plane to El Paso, Texas, where federal agents arrested him. Alvarez was later arraigned and transported to Los Angeles for trial. He remained in federal custody from April 1990 until December 1992.

Alvarez moved to dismiss the indictment, arguing that the federal courts lacked jurisdiction to try him because his arrest violated the United States-Mexico Extradition Treaty. Both the district court and this court agreed, *see United States v. Alvarez-Machain ("Alvarez-Machain I"),* 946 F.2d 1466, 1466-67 (9th Cir.1991) (per curiam), *affg United States v. Caro-Quintero,* 745 F.Supp. 599 (C.D.Cal.1990), but the Supreme Court reversed and remanded the case for trial. *See United States v. Alvarez-Machain ("Alvarez-Machain II"),* 504 U.S. at 669-70, 112 S.Ct. 2188.

The Supreme Court held that Alvarez's arrest did not violate the United States-Mexico Extradition Treaty. Applying the doctrine announced in *Ker v. Illinois,* 119 U. S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), the Court held that a court retains its power to try a person for a crime even where the person has been brought within the court's jurisdiction by forcible abduction. *Alvarez-Machain II,* 504 U.S. at 670, 112 S.Ct. 2188. Significantly, however, the Court noted that

Alvarez's abduction "may be in violation of general international law principles" and did not foreclose Alvarez from later pursuing a civil remedy. *See id.* at 669, 112 S.Ct. 2188; *see also Ker*, 119 U.S. at 444, 7 S.Ct. 225 (stating that "[t]he [kidnapped] party himself would probably not be without redress, for he could sue [the kidnapper] in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action").

Following the Supreme Court's ruling, the case proceeded to trial in 1992. After the presentation of the government's case, the district judge granted a motion for judgment of acquittal on the ground that the government had adduced insufficient evidence to support a guilty verdict. The court concluded that the case against Alvarez was based on "suspicion and . . . hunches but . . . no proof," and that the government's theories were "whole cloth, the wildest speculation."

In 1993, after returning to Mexico, Alvarez filed this action against Sosa, Garate, five unnamed Mexican civilians, the United States, and four DEA agents. The amended complaint alleged a number of conventional and constitutional torts.[1]

The district court substituted the United States for the DEA agents, except Sosa and Garate, on all nonconstitutional claims. The parties later stipulated to the substitution of the United States for Garate. Sosa's interlocutory appeal on the substitution motion was dismissed for lack of appellate

[1] Specifically, Alvarez alleged the following conventional tort claims: (1) kidnapping; (2) torture; (3) cruel, inhuman, and degrading treatment or punishment; (4) arbitrary detention; (5) assault and battery; (6) false imprisonment; (7) intentional infliction of emotional distress; (8) false arrest; (9) negligent employment; and (10) negligent infliction of emotional distress. Alvarez alleged constitutional torts under the Fourth, Fifth, and Eighth Amendments for the acts of kidnapping, torture, cruel and inhuman and degrading treatment or punishment, denial of adequate medical treatment, and arbitrary detention.

jurisdiction. *See Alvarez-Machain v. United States ("Alvarez-Machain III")*, 107 F.3d 696, 700 n. 2 (9th Cir.1997) (as amended).

In *Alvarez-Machain III*, we also affirmed the district court's dismissal of the constitutional claims arising out of harms suffered by Alvarez in Mexico, the denial of the DEA agents' defense based on qualified immunity, and the denial of the United States' defense that the FTCA claims were time-barred. We reversed the district court's dismissal of a claim under the Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73. 107 F.3d at 703-04.[2]

Upon remand, the district court entered summary judgment for Alvarez on his claims against Sosa for kidnapping and arbitrary detention under the ATCA. The court held that both state-sponsored, transborder abductions and arbitrary detentions violated customary international law.[3] The court granted summary judgment to the United States, however, on Alvarez's FTCA claims, concluding that Alvarez's apprehension was privileged and was not a false arrest under California law.

These rulings left for resolution the question of Sosa's liability on the remaining tort claims, as well as the calculation of damages on the kidnapping and arbitrary detention claims. After a bench trial, the district court found for Sosa on all remaining claims and held that Alvarez could recover damages under the ATCA only for his detention in Mexico prior to his arrival in the United States. The court applied federal common law, rather than Mexican law, for the calculation of damages and awarded Alvarez $25,000.

[2] The constitutional claims under *Bivens v. Six Unknown Named Agents, 403 U.S. 388*, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and the Torture Act claim are no longer at issue.

[3] The district court found that a third claim brought by Alvarez under the ATCA for cruel, inhuman, and degrading treatment was barred by the law of the case.

These consolidated appeals followed. Sosa appeals the judgment against him, claiming that the district court erred in allowing a cause of action under the ATCA and in applying federal common law, rather than Mexican law, for the calculation of damages. On the ATCA claims, Alvarez appeals the district court's substitution of the United States for the DEA agents and the limitation of damages to those suffered during his imprisonment in Mexico. He also appeals the dismissal of his FTCA claims.

A three judge panel of this court affirmed Sosa's liability on the ATCA claims, upheld the substitution and damages rulings under ATCA, and reversed the dismissal of Alvarez's FTCA claims. *Alvarez-Machain v. United States ("Alvarez-Machain IV")*, 266 F.3d 1045, 1064 (9th Cir.2001), *reh g en banc granted*, 284 F.3d 1039, 1040 (9th Cir.2002).

DISCUSSION

I. ALIEN TORT CLAIMS ACT-JURISDICTION AND CAUSE OF ACTION

The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Although enacted in 1789 as part of the first Judiciary Act, the ATCA received little attention until 1980,[4] when the Second Circuit, in a comprehensive analysis of the statute, held that the ATCA provided subject matter jurisdiction over an action brought by Paraguayan citizens for torture-a violation of the law of

[4] In 1975, Judge Friendly remarked that the statute had been invoked so rarely since its inception that it existed as "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act ... no one seems to know whence it came." *HT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975) (noting the paucity of cases under the Act and holding that no jurisdiction existed under the Act for fraud and securities claims against foreign corporations).

nations-committed in Paraguay. *See Filartiga v. Pena-Irala (Filartiga I)*, 630 F.2d 876 (2d Cir.1980).

Since the *Filartiga I* decision, the ATCA has been invoked in a variety of actions alleging human rights violations. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir.1996) (affirming judgment under ATCA against former Ethiopian official for torture and cruel, inhuman, and degrading treatment); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir.1995) (concluding that alleged war crimes, genocide, torture, and other atrocities committed by a Bosnian Serb leader were actionable under the ATCA); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir.1984) (dismissing for lack of subject matter jurisdiction claims brought against the Palestine Liberation Organization, the Libyan government, and other entities for terrorist activities allegedly in violation of the law of nations); *Xuncax v. Gramajo*, 886 F.Supp. 162 (D.Mass. 1995) (deeming torture, summary execution, "disappearance," and arbitrary detention by Guatemalan military to be actionable violations under the ATCA).

Our first opportunity to address the scope of the ATCA came in *Trajano v. Marcos (In re Estate of Marcos Human Rights Litig.) ("Marcos I")*, 978 F.2d 493 (9th Cir.1992), a wrongful death action against former Philippine President Ferdinand Marcos and his daughter for the torture and murder of a Philippine citizen. We recognized that "it would be unthinkable to conclude other than that acts of official torture violate customary international law," and concluded that the plaintiff, an alien, had properly invoked the subject matter jurisdiction of the federal courts under the ATCA. *Id.* at 499 (citation and internal quotation marks omitted). Referencing an April 1787 letter from James Madison to Edmond Randolph, we concluded that "[t]here is ample indication that the 'Arising Under' Clause was meant to extend the judicial power of the federal courts . . . to 'all cases which concern foreigners.'" *Id.* at 502. Because the "Arising Under" Clause

gave Congress the power to enact the ATCA, we held that exercising jurisdiction over the claims would not run afoul of Article III of the Constitution. *Id.* at 502-03.

When the Marcos litigation returned to this court in *Hilao v. Estate of Marcos (In re Estate of Marcos, Human Rights Litig) ("Marcos II"), 25* F.3d 1467 (9th Cir.1994), we further delineated the contours of the ATCA.[5] We resolved that the Act not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations: "[S]ection 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action." *Id.* at 1475 (quoting *Tel-Oren, 726* F.2d at 779 (Edwards, J., concurring)). In other words, "[n]othing more than *a violation* of the law of nations is required to invoke section 1350." *Id.* (citation omitted).

Of course, not every violation of international law constitutes an actionable claim under the ATCA. In *Marcos II,* we were careful to limit actionable violations to those international norms that are "specific, universal, and obligatory." *Id.* at 1475. This formulation, which lays the foundation for our approach to international norms, is in keeping with the narrow scope of ATCA jurisdiction and the general practice of limiting judicial review to those areas of international law that have achieved sufficient consensus to merit application by a domestic tribunal. *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 428, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions

[5] Following *Marcos II,* we issued several other decisions in relation to the Marcos litigation, two of which are referenced in this opinion: *Hilao v. Estate of Marcos ("Marcos III"),* 103 F.3d 767 (9th Cir.1996) and *Hilao v. Estate of Marcos ("Marcos IV"),* 103 F.3d 789 (9th Cir.1996).

regarding it . . . ."); *cf. United States v. Smith,* 18 U.S. (5 Wheat.) 153, 162, 5 L.Ed. 57 (1820) (finding piracy "universally treat[ed] . . . as an offence against the law of nations" and "sufficiently and constitutionally defined" by commentators to be punishable by Congress).

Sosa urges a narrow reading of the "law of nations" and a correspondingly strict interpretation of the "specific, universal, and obligatory" requirement. He argues that only violations of *jus cogens* norms, as distinguished from violations of customary international law, are sufficiently "universal" and "obligatory" to be actionable as violations of "the law of nations" under the ATCA. We decline to embrace this restrictive reading, as we are guided by the language of the statute, not an imported restriction.

The term *jus cogens* refers to a category of "peremptory norms" that are "'accepted and recognized by the international community of states as a whole as . . . norm[s] from which no derogation is permitted.'" *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 714 (9th Cir.1992) (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679). Customary international law, a direct descendent of the "law of nations," is a related, but distinct, concept. *Id.* It refers more generally to those established norms of contemporary international law that are "ascertain[ed] . . . 'by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Id.* at 714-15 (quoting *Smith,* 18 U.S. at 160-61).

We have explained the difference between these two concepts as follows:

> While *jus cogens* and customary international law are related, they differ in one important respect. Customary international law, like international law defined by

treaties and other international agreements, rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm

. . . .

In contrast, *jus cogens* embraces customary laws considered binding on all nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or selfinterested choices of nations. Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent. . . .

Because *jus cogens* norms do not depend solely on the consent of states for their binding force, they enjoy the highest status within international law.

Id. at 715 (internal quotation marks and citations omitted).[6]

Given the non-derogable nature of *jus cogens* norms, it comes as no surprise that we have found that *a jus cogens* violation is sufficient to satisfy the "specific, universal, and obligatory" standard. *See Marcos II, 25* F.3d at 1475. But the fact that a violation of this subcategory of international norms is *sufficient* to warrant an actionable claim under the ATCA does not render it *necessary*. Indeed, our recent cases lay out the components of an actionable violation without reference to *jus cogens*. *See Papa v. United States,* 281 F.3d 1004, 1013 (9th Cir.2002) (remanding case to district court to

[6] The commentators embrace this distinction. *See* 1 M. Cherif Bassiouni, *International Criminal Law 40* (2d ed. 1999) ("[A] *jus cogens* norm holds the highest hierarchical position among all other norms and principles. *As* a consequence of that standing, *jus cogens* norms are deemed to be 'peremptory' and 'non-derogable.'"); Ian Brownlie, *Principles of Public International Law* 515 (5th ed. 1998) ("The major distinguishing feature of *[jus cogens]* rules is their relative indelibility.").

apply the "applicable standard," which requires plaintiffs to allege "specific, universal, and obligatory" norms as part of their claim); *Martinez v. City of Los Angeles,* 141 F.3d 1373, 1383-84 (9th Cir.1998) (recognizing, without a discussion of *jus cogens,* that arbitrary detention meets the standard for a cognizable ATCA claim).

The notion of *jus cogens* norms was not part of the legal landscape when Congress enacted the ATCA in 1789. *See* Brownlie, *supra,* at 516 (explaining the modern evolution of *jus cogens).* Thus, to restrict actionable violations of international law to only those claims that fall within the categorical universe known as *jus cogens* would deviate from both the history and text of the ATCA.

Although a strict categorical approach may have surface appeal for its apparent ease of application, it is far from certain which norms would qualify for *jus cogens* status. The development of an elite category of human rights norms is of relatively recent origin in international law, and "[although the concept of jus cogens is now accepted, its content is not agreed." Restatement (Third) of the Foreign Relations Law of the United States § 102 n. 6 (1987) ("Restatement on Foreign Relations"). As one respected commentator put it, "more authority exists for the category of *jus cogens* than exists for its particular content. . . ." Brownlie, *supra,* at 516-17; *see also* Theodor Meron, *On a Hierarchy of International Human Rights,* 80 A.J.I.L. 1, 14-15 (1986) (explaining the difficulties of strict categorization in defining peremptory norms). We therefore remain confident that the standard established in *Marcos II* and repeated throughout our case law best reflects the text and purpose of the ATCA and provides sufficient guidance for evaluating Alvarez's claim.

With this international law background in mind, we turn to Alvarez's contentions on appeal. Alvarez argues that he has a remedy under the ATCA for two separate violations of international law. First, he claims that state-sponsored abduction

within the territory of another state without its consent is a violation of the international law of sovereignty and the customary norms of international human rights law. Second, he contends that his seizure and confinement violated the international customary legal norm against arbitrary arrest and detention.

In view of the dissent's rhetoric and lengthy discourse, it may not be readily apparent that the dissent is in accord with a significant portion of our holding. Ten members of the en banc court agree that Alvarez lacks standing to obtain redress for claims based on an alleged violation of Mexico's sovereignty and that his claim for transborder abduction fails.[7] These same judges also agree that there is a universally recognized norm prohibiting arbitrary arrest and detention. It is only as to the application of this latter norm that we part company.

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[7] Judge Gould's solitary dissent on the political question issue misses the mark, as the other dissenters acknowledge. *See infra* at n. 2 (O'Scannlain, J., dissenting). The mere fact that this case raises difficult and politically sensitive issues connected to our foreign relations does not preclude us from carrying out the legislative mandate of Congress under § 1350. *See Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("[I]t is error to suppose that every case or controversy which touches upon foreign relations lies beyond judicial cognizance."). The crux of the claim here rests on legislative delegation, not foreign relations. We see a critical distinction between, on the one hand, second guessing the foreign policy judgments of the political branches to whom such judgments have been constitutionally assigned and, on the other hand, reviewing claims based in tort and brought under federal statutes instructing the judiciary to adjudicate such claims. *See Kadic*, 70 F.3d at 249 ("The department to whom this [tort suit against the PLO] has been constitutionally committed is none other than our own-the Judiciary.") (internal quotation marks and citation omitted); *Abebe-Jira*, 72 F.3d at 848 (holding that the political question doctrine did not bar tort action brought by former prisoners in Ethiopia under the ATCA).

A. TRANSBORDER ABDUCTION AND THE LAW OF NATIONS

1. STANDING AND SOVEREIGNTY

Alvarez claims that his arrest violated Mexico's sovereign rights because Mexico had not granted the United States permission to exercise police power on its soil. Because such an encroachment on Mexico's sovereignty violates "the law of nations" within the meaning of the ATCA, Alvarez reasons, he is entitled to relief under that statute. The district court agreed and rejected Sosa's objection that Alvarez lacks standing to invoke Mexico's sovereignty rights.

We have little trouble accepting the premise from which Alvarez begins. Few principles in international law are as deeply rooted as the general norm prohibiting acts of sovereignty that offend the territorial integrity of another state. *See generally 1* L. Oppenheim, *Oppenheim's International Law* § 119 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); *see also* F.A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law, in International Law at a Time of Perplexity* 407 & n. 2 (Yoram Dinstein & Mala Tabory eds. 1989) (referring to this "incontrovertible" rule as "elementary"). This tenet, as Alvarez points out, can be traced to the earliest decisions of the Supreme Court. Most notably, in 1812, when faced with the question whether an American citizen could assert title to an armed French vessel found in the territorial waters of the United States, Justice Marshall began his landmark decision by emphasizing the "exclusive and absolute" nature of territorial jurisdiction, exceptions to which "must be traced up to the consent of the nation itself." *Schooner Exchange v. M'Faddon, 11 U.S. (7* Cranch) 116, 136, 3 L.Ed. 287 (1812).

Twelve years later, Justice Story voiced similar sentiments. Analyzing an American seizure of a foreign ship that had

sailed into Spanish waters, he observed that "[i]t would be monstrous to suppose that our . . . officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations." *The Apollon*, 22 U. S. (9 Wheat.) 362, 371, 6 L.Ed. 111 (1824).

Alvarez seeks to invoke a principle, concomitant with this precept of territorial sovereignty, that prohibits a state's law enforcement agents from exercising their functions in the territory of another state without the latter's consent. The Supreme Court clearly recognized this proscription in *The Appollon*. In addition, several notable authorities are in accord. *See* Restatement on Foreign Relations § 432(2) ("A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."); 1 Oppenheim, *supra*, § 119, at 387-88 ("It is ... a breach of international law for a state without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime."); *see also M.* Cherif Bassiouni, *International Extradition: United States Law and Practice* 255 (4th ed. 2002) (recognizing the rule and noting that it is "grounded in the notion that international law is designed to protect the sovereignty and territorial integrity of states by restricting impermissible state conduct"). But whatever the modern contours of this principle or its corollaries, they are inapplicable here and need not be explored because Alvarez cannot establish, as a threshold mater, that he has standing to assert Mexico's interests in its territorial sovereignty.[8]

[8] Although we need not examine the place of such a rule in customary international law or as it applies to this case, we note that Alvarez's assertion is not wholly straightforward, as it raises complex questions about the intersection of extraterritorial criminal jurisdiction, extraterritorial enforcement, and state sovereignty. The three concepts are not necessarily correlative as a matter of international law. *See, e.g., S.S. Lotus* (Turk. v. Fr.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7) ("The territoriality of criminal law . . . is not an absolute principle of international law and by no means coincides with territorial sovereignty."). And although extraterritoriality is well-established in our jurisprudence, *see infra* Part I.B., to the extent that either extraterritorial jurisdiction or extraterritorial enforcement overlap with the national laws and policies of another state, inevitably there is a potential for friction between states. *See* Bassiouni, *International Extradition*, *supra*, at 314 n. 1.

The Supreme Court has instructed that to meet the "irreducible constitutional minimum of standing" under Article III, plaintiffs must "[f]irst and foremost" show the existence of an "injury in fact." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal citations and quotation marks omitted). Related to this constitutional prerequisite is a separate "prudential" requirement of standing: plaintiffs must demonstrate they are "proper proponents of the particular legal rights on which they base their suit." *Singleton v. Wulff*, 428 U.S. 106, 112, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). This requirement applies "even when the very same allegedly illegal act that affects the litigant also affects a third party." *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990). Although Alvarez may have properly alleged that Mexico's sovereignty was infringed during his abduction-an issue we need not resolve here-he has not demonstrated that he is a proper party to vindicate Mexico's national interests.

Alvarez argues that he meets the standing requirements because courts may review ATCA claims whenever an alien "is injured tortiously in the course of the defendant's violation of international law." But the ATCA creates a remedy for "a tort ... committed in violation of the law of nations," not "in the course of" any recognized international law violation. 28 U.S.C. § 1350. The legal rights on which

Alvarez bases his claim, and which the ATCA recognizes, are those that protect the individual from tortious conduct. By its terms, the ATCA provides only for suits by individual aliens; it does not allow for an individual to vindicate the rights of a foreign government.

To allow state-on-state injuries like the one Alvarez alleges here to be vindicated by a third party not only would read too much into the ATCA, but would lead to the judiciary's intrusion into matters that are appropriately reserved for the Executive branch. Although international human rights litigation under the ATCA inevitably raises issues implicating foreign relations, sovereigns' prerogatives are ordinarily and traditionally handled through diplomatic channels.[9] The right of a nation to invoke its territorial integrity does not translate into the right of *an individual* to invoke such interests in the name of the law of nations.

Alvarez seeks refuge in *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), the case that previously doomed his attempt to secure dismissal of his criminal indictment. *See Alvarez-Machain II*, 504 U.S. at 662, 112 S.Ct. 2188. Like Alvarez, Ker claimed forcible abduction from a foreign country, in his case Peru. Although the Supreme Court refused to dismiss Ker's indictment, it observed that Ker was "probably not . . . without redress, for he could sue [his abductor] in an action of trespass and false imprisonment." *Ker*, 119 U.S. at 444, 7 S.Ct. 225. The Court made no guarantees, however, regarding a claim under the

[9] We do not mean to imply that an individual never has a claim for breach of the law of nations for which a state-to-state remedy also exists. *See* Restatement on Foreign Relations § 703(1) (establishing states' rights to take action against fellow states that transgress international human rights norms). We note, however, that the commentary of the Restatement on Foreign Relations indicates that most state-to-state remedies are subordinated to individual remedies where transgressor states' domestic law makes such remedies available. *See id.* §§ 703 cmt. d, 713 cmt. f.

ATCA or any other federal statute; nor did it intimate that Ker could sue to avenge Peru's sovereignty rights. Rather, the Court noted that Peru could pursue a separate remedy—the kidnapper's extradition. *Id. Ker* thus implicitly drew the distinction between vindication of individual rights and a sovereign's vindication of its rights. *Ker* does not bridge the gap in Alvarez's claim.

2. TRANSBORDER ABDUCTION AND CUSTOMARY INTERNATIONAL LAW

Apparently cognizant of the constitutional barrier to his claim, Alvarez offers an alternative theory: he seeks to bypass the standing hurdle by arguing that, notwithstanding any infringements upon Mexico's sovereignty, the act of transborder kidnapping was, in itself, a violation of customary international human rights law. This norm, as defined by Alvarez, creates *a personal* right under the law of nations.

Sosa, the DEA agents, and the United States all urge that this norm fails the law of nations test. They contend that the prohibition that Alvarez identifies has not reached the level of acceptance in the international community sufficient to qualify as "universal" and "obligatory." They also argue that, whatever degree of agreement other nations have reached, the United States has affirmatively and definitively rejected this principle. We agree. The United States does not recognize a prohibition against transborder kidnapping, nor can it be said that there is international acceptance of such a norm.

We embrace the Supreme Court's directive that the law of nations "may be ascertained by consulting the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law." *Smith*, 18 U.S. at 160-61; *see also The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900) ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision,

resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators. . . ."). Evidence of the law of nations may also be garnered from international agreements and United Nations declarations. *See Siderman*, 965 F.2d at 716-17; *Filartiga I*, 630 F.2d at 883-84.

Article 38 of the Statute of the International Court of Justice serves as a convenient summary of the sources of international law, although we recognize that defining "[t]he 'sources' of international law is a subject of much continuing scholarship." *United States v. Yousef*, 327 F.3d 56, 100-01 (2d Cir.2003). Article 38 provides, in part:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general ractice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[10]

Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, U.S.T.S. 993.

[10] Article 59 states: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

International agreements to which the United States is a signatory provide an obvious and convenient starting point. It would be, of course, a relatively simple analysis if we could pinpoint in such an agreement a prohibition against transborder abductions. Despite eloquent arguments to the contrary, we find no such support in the text of any international agreement.

Alvarez and the amici point to a number of international human rights instruments which, they argue, support an individual right to remain free of transborder abductions. But no authority cited by Alvarez recognizes an explicit prohibition against forcible abduction.[11] Rather, each of the authorities speaks to general prohibitions against restricting an individual's right to freedom and movement and security of person. For example, the American Convention on Human Rights ("American Convention"), which Alvarez cites, states that "[e]very person has the right to personal liberty and security" and "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." Art. 7(1), 7(2), *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (signed but not ratified by the United States). Similarly, the International Covenant on Civil and Political Rights ("ICCPR") provides that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." Art. 12, G.A. Res. 2200, 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the United States Sept. 8, 1992). *See also* Universal Declaration of

[11] The Restatement on Foreign Relations reflects this void: "None of the international human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law." Restatement on Foreign Relations § 432 n. 1.

Human Rights ("Universal Declaration"), art. 13(1), G.A. Res. 217A (III), 3 U.N. GAOR, Supp. No. 16, U.N. Doc. A/810 (1948) ("Everyone has the right to freedom of movement and residence within the borders of each state.");[12] American Declaration of the Rights and Duties of Man, art. VIII, May 2, 1948, O.A.S. Res. XXX, *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.LV/II. 82 doc. 6 rev. 1, at 17 (1992) ("Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will."). Such general prohibitions are insufficient to support Alvarez's claim that there is an international norm against transborder abduction because an actionable claim under the ATCA requires the showing of a violation of the law of nations that is "specific, universal, and obligatory."

Looking beyond the declarations and covenants to treaties does not yield a different result.[13] At the time of Alvarez's abduction, the United States-Mexico Extradition Treaty did not extend to transborder abduction and there was no separate treaty with such a prohibition. *See Alvarez-Machain II*, 504 U.S. at 669-70, 112 S.Ct. 2188. The absence of any agreement is consistent with our conclusion that the United States has not embraced the prohibition urged by Alvarez. That is not to say that Alvarez's abduction went unnoticed. Indeed, it was met with a formal diplomatic protest by Mexico and considerable public outcry.[14]

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[12] We have recognized that the Universal Declaration, although not binding on states, constitutes "a powerful and authoritative statement of the customary international law of human rights." *Siderman*, 965 F.2d at 719.

[13] The ATCA permits suits for both a "violation of the law of nations" and torts in violation of "a treaty of the United States." 28 U.S.C. § 1350.

[14] The Mexican Government filed an official protest with the United States, presenting a diplomatic note to the U.S. Department of State on three separate occasions. *See* Brief for the United Mexican States as Amicus Curiae in Support of Affirmance at 3-4, *Alvarez-Machain II*, *reprinted in* 31 I.L.M. 934, 938-39 (1992); *see also Caro-Quintero*, 745 F.Supp. at 604. The resulting friction between the United States and Mexico was well documented. *See, e.g.*, Marjorie Miller & Douglas Jehl, *Mexico to Confront US. on Camarena Case Abduction*, L.A. Times, April 18, 1990, at A1; Carlyle C. Douglas, *Arm of US. Law Is Too Long, Mexico Complains*, N.Y. Times, April 22, 1990, § 4, at 11; Jack Epstein, *Growing Uproar in Mexico About Alleged Abuses by U.S.*, S.F. Chron., July 7, 1992, at A8.

In 1994, four years after Alvarez was abducted, the United States and Mexico reached an agreement to prohibit the practice of transborder arrest. Treaty to Prohibit Transborder Abductions, Nov. 23, 1994, U.S.-Mex., *reprinted in* Michael Abbell, *Extradition to and From the United States*, at A-303 (2002). That agreement is not yet in force, however, because the President has not submitted it to the Senate for its advice and consent. *See id.* at A-287. In any event, the proposed treaty would not help Alvarez: it would explicitly foreclose the right of abductees to sue their abductors. *See id.* at A-303. If anything, this development underscores the void that existed before the treaty was signed and the reality that the United States does not yet consider itself bound by the supposed norm against transborder abductions. Alvarez offers no other legislative or judicial source that supports a specific, enforceable norm against transborder abductions.

The United States claims that unilateral, transborder abductions are a "rare" occurrence. And the notion of sneaking across the border to nab a criminal suspect surely raises more than a diplomatic eyebrow. Nonetheless, our review of the international authorities and literature reveals no specific binding obligation, express or implied, on the part of the United States or its agents to refrain from transborder kidnapping. Nor can we say that there is a "universal" consensus in the sense that we use that term to describe well-entrenched customs of international law. Any agreement that

may exist on this score has failed to surface in the declarations and accords that commonly manifest the mutual concern of states. *See Filartiga I*, 630 F.2d at 888 ("It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."). Because a human rights norm recognizing an individual's right to be free from transborder abductions has not reached a status of international accord sufficient to render it "obligatory" or "universal," it cannot qualify as an actionable norm under the ATCA. This is a case where aspiration has not yet ripened into obligation.[15]

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[15] The dissent asserts that we could shortcut our analysis and make ATCA review "easier" by determining, as a threshold matter, whether the United States, through the political branches, has decided variously not to "recognize," "assent," "agree with," or "subscribe to" an international norm prohibiting transborder arrests. Should the United States demonstrate any form of non-acquiescence, the customary international law norm would, according to the dissent, fail to achieve "universal" status for purposes of ATCA liability.

Although we accept the well-established principle that customary-norms are fundamentally based on the consent of states, and that the United States might well decide to deliberately disavow or repudiate certain principles of international law, we cannot agree with the dissent's implication that every executive branch decision to breach an international norm translates into a more global repudiation of that norm or necessarily insulates the United States and its agents from civil tort liability. Our understanding accords with *Ker*, 119 U.S. at 444-45, 7 S.Ct. 225 (holding that civil remedies might still be available for violations of treaties or the law of nations even though jurisdiction to prosecute a defendant criminally may not be invalidated by an extraterritorial abduction), and the Supreme Court's more recent acknowledgment that Alvarez might be correct that his abduction was "shocking" and "in violation of general international law principles" *Alvarez-Machain II*, 504 U.S. at 669, 112 S.Ct. 2188; *see also The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900) (stating that "[i]nternational law is part of our

B. ARBITRARY ARREST AND DETENTION AND THE LAW OF NATIONS

Alvarez is not, however, without a remedy. The unilateral, nonconsensual extraterritorial arrest and detention of Alvarez were arbitrary and in violation of the law of nations under the ATCA.

1. THE PROHIBITION AGAINST ARBITRARY ARREST AND DETENTION

Unlike transborder arrests, there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention. This prohibition is codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions. *See M.* Cherif Bassiouni, *Human Rights in the Context of Criminal Justice. Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 260-61 (1993). The Universal Declaration perhaps the most well-recognized explication of international human rights norms, provides that "[n]o one shall be subjected to

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law," and that "where there is no treaty, and no *controlling* executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . .") (emphasis added); *Yousef*, 327 F.3d at 92 n. 25 ("While it is not possible to claim that the practice or policies of any one country, including the United States, has any such authority that the contours of customary international law may be determined by reference *only* to that country, it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as *a bona fide* customary international law principle.") (emphasis added); Louis Henkin, Foreign Affairs and the U.S. Constitution 243 (2d ed. 1996) (explaining that "[u]nlike treaties ... principles of customary international law cannot be denounced or terminated by the President and cannot be eliminated from the law of the United States by *any* Presidential act.") (emphasis added).

arbitrary arrest, detention, or exile," Universal Declaration, art. 9, and the ICCPR, which the United States has ratified,[16] unequivocally obliges states parties to refrain from "arbitrary arrest or detention." ICCPR, art. 9.[17]

We recently reaffirmed the universal, obligatory, and specific nature of this norm in *Martinez*, 141 F.3d at 1384 (recognizing a "clear international prohibition against arbitrary arrest and detention"); *see also Marcos IV*, 103 F.3d at 795 (recognizing "arbitrary detention ... as[an] actionable violation[ ] of international law"). We explained, in defining the norm, that "[d]etention is arbitrary 'if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Martinez*, 141 F.3d at 1384 (quoting Restatement on Foreign Relations § 702 cmt. h).[18]

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[16] The ICCPR is one of several international covenants designed to formally codify many of the rights embodied in the Universal Declaration. *See* Brownlie, *supra*, at 576.

[17] Each of the regional human rights instruments contains a similar prohibition. *See* American Convention, art. 7(3) ("No one shall be subject to arbitrary arrest or imprisonment."); European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), art. 5(1), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (deprivation of liberty must be "in accordance with a procedure prescribed by law" and only in the case of, *inter alia*, "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority. . . ."); African Charter on Human and Peoples' Rights ("African Charter"), art. 6, June 27, 1981, 21 I.L.M. 58 (1982) ("[N]o one may be arbitrarily arrested or detained.").

[18] Our standard reflects the language of the Restatement as well as other major international sources. *See* Restatement on Foreign Relations § 702 cmt. h; ICCPR, art. 9(1) ("No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."); *id.*, art. 9(5) ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."); European Convention, art. 5(1) (deprivation of liberty must be "in accordance with a

Sosa acknowledges the prohibition against arbitrary arrest and detention, but he contends that for ATCA liability to attach, Alvarez's detention must be "prolonged" in addition to being arbitrary. We can divine no such requirement in our precedent or in the applicable international authorities. Rather, as the language of the international instruments demonstrates, the norm is universally cited as one against "arbitrary" detention and does not include a temporal element. Other authorities reflect this understanding. *See, e.g.*, Bassiouni, *Human Rights in the Context of Criminal Justice*, *supra*, at 260; Paul Sieghart, *The International Law of Human Rights* 135-59 (1983); *see also* United Nations Study, *supra*, at 5-8 (defining elements of the norm without mention of a temporal component).[19]

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procedure prescribed by law" and only in the case of, *inter alia*, "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority. . . ."); African Charter, art. 6 ("No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."); *see also Winterwerp v. Netherlands*, 33 Eur. Ct. H.R. (ser. A.) at para. 39 (1979) ("[N]o detention that is arbitrary can ever be regarded as lawful."); United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention, and Exile* 7 (1964) ("United Nations Study") (adopting the view that "an arrest or detention is arbitrary if it is (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the purpose of which is incompatible with the respect for the right to liberty and security of person").

[19] This reading is also supported in the case law. *See, e.g., de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir.1985) (recognizing "the right not to be arbitrarily detained" as part of the law of nations); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir.1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."); *Paul v. Avril*, 901 F.Supp. 330, 333-34, 335 (S.D.Fla.1994) (concluding plaintiff suffered arbitrary detention although he was held for less than ten hours); *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1541 (N.D.Cal. 1987) ("There is case law finding sufficient consensus to evince

Although § 702 of the Restatement on Foreign Relations includes a reference to "prolonged arbitrary detention,"[20] neither the Restatement nor our cases import a separate temporal requirement for purposes of ATCA liability. Section 702 contains a short list of human rights norms that it deems sufficient to qualify as customary law violations. *See* Restatement on Foreign Relations § 702(a)-(g). But the comments to § 702 clarify that the list is non-exhaustive and that virtually all of the norms listed, including "prolonged arbitrary detention," belong among the elite set of *jus cogens* norms that are non-derogable. *Id.* cmts. a, n. Section 702 does not state that every arbitrary detention must be "prolonged" to qualify as a violation of the law of nations—which is all that is required under the ATCA-and in fact implies the opposite. *See id.* cmt. ("A single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement."). Likewise, our holding in *Martinez*, which cited the Restatement, included the length of detention as but one factor among many in determining whether a violation of the law of nations had occurred. 141 F.3d at 1384.

This is not to say that the length of detention cannot be a factor in evaluating whether there was an actionable violation of international law. Indeed, an extended detention following

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a customary international human rights norm against arbitrary detention. The consensus is even clearer in the case of a state's *prolonged* arbitrary detention of its own citizens." (internal citations omitted)); *see also Litwa v. Poland*, App. No. 26629/95, 33 Eur. H.R. Rep. 53 (2000) (finding detention of six hours and thirty minutes constitutes violation under Article 5 of the European Convention); *Quinn v. France*, App. No. 18580/91, 21 Eur. H.R. Rep. 529 (1995) (finding claim of arbitrary detention under Article 5 of the European Convention where petitioner was detained for a period of eleven hours).

[20] The Restatement provides that "[a] state violates international law if . . . it practices, encourages, or condones . . . prolonged arbitrary detention." Restatement on Foreign Relations § 702(e).

an improper arrest would necessarily contribute to "arbitrariness." We simply hold, consistent with international law, that there is no freestanding temporal requirement nor any magical time period that triggers the norm.

2. APPLICATION OF ARBITRARY ARREST AND DETENTION STANDARD TO ALVAREZ

The standard then is whether the arrest and detention were arbitrary, that is, "not pursuant to law."[21] *Martinez*, 141 F.3d at 1384. In the case before us, there was, quite simply, no basis in law for the unilateral extraterritorial arrest and related detention of Alvarez in Mexico.

The only instrument Sosa can point to as evidence that Alvarez's abduction was "pursuant to law" is an arrest warrant issued by the United States District Court for the Central District of California. But a federal arrest warrant, without more, hardly serves as a license to effectuate arrests worldwide. It is no accident that the warrant is directed to "The United States Marshal and any *Authorized* United States Officer" (emphasis added). The Federal Rules of Criminal Procedure in effect at the time of Alvarez's arrest provided that "[a] warrant may be executed . . . within the jurisdiction of the United States." Fed.R.Crim.P. 4(d)(2).[22] The language

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[21] Although the norm against arbitrary arrest and detention may encompass both illegal and unjust acts, we need not decide here under what circumstances an "unjust" arrest or detention might qualify as "arbitrary." *See, e.g.*, Restatement of Foreign Relations § 702 n. 6 ("Detention is arbitrary if it is unlawful or unjust."); Laurent Marcoux, Jr., *Protection from Arbitrary Arrest and Detention Under International Law*, 5 B.C. Int'l Comp. & L. Rev. 345 (1982) (analyzing the language and drafting history of the Universal Declaration and ICCPR as evidence that the term "arbitrary" was chosen to encompass a broader standard than mere unlawfulness).

[22] Rule 4(d)(2) was amended on December 1, 2002. The Rule, renumbered as 4(c)(2), now reads, "A warrant may be executed, or a summons served, within the jurisdiction of the United States *or anywhere else a*

could hardly be clearer-"within the jurisdiction of the United States" means exactly what it says.[23]

Despite the clear limitation on the extraterritorial reach of the arrest warrant, Sosa would have us believe that Alvarez's arrest in Mexico was authorized under American law.[24] The

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federal statute authorizes an arrest" (underscoring indicates amendment). The advisory committee notes clarify that the "new language . . . reflects the recent enactment of the Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488) that permits arrests of certain military and Department of Defense personnel overseas. *See also* 14 U.S.C. § 89 (Coast Guard authority to effect arrests outside territorial limits of United States)." Fed.R.Crim.P. 4 advisory committee's note. The calibraion of Rule 4 to statutes in which Congress has made explicit the territorial reach of the arrest power demonstrates not only the limited scope of a traditional arrest warrant, but Congress's own recognition that it must speak clearly when expanding the geographical scope of an agent's extraterritorial arrest authority.

[23] Alvarez, of course, was only one of many charged in comection with Camarena's murder. An indictment issued on January 30, 1985 charged twenty-two persons with crimes in connection with Camarena's murder. Seven were tried in federal court. Including Alvarez, thee of the seven were brought "by means of covert forcible abductior from their homelands." *Caro-Quintero*, 745 F.Supp. at 602. Alvarez's abduction was unique in that it involved neither the cooperation of local police nor the consent of a foreign government. *See United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1216 (9th Cir.1988), *rev'd*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (Camarena murder suspect arrested by local Mexican police after U.S. arrest warrant was issued and suspect was handed over to U.S. Marshals at the U.S.-Mexico border); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 256 (7th Cir.1990) (Camarena murder suspect arrested in Honduras by Honduran Special Troops accompanied by U.S. Marshals; suspect driven to U.S. Air Force Base and flown to U.S.). Others were arrested in the United States. *See United States v. Lopez Alvarez*, 970 F.2d 583, 586 (9th Cir.1992); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1203 (9th Cir.1991).

[24] The district court emphasized that no warrant was issued by Mexican authorities and no Mexican official lawfully effectuated the arrest. Although the district court focused on this lack of local authority, our analysis centers on the DEA's authority under United States law. We do

United States takes the same position in its defense against Alvarez's false arrest claim, which we discuss in a later section but which is also relevant here. Both parties conclude that the federal officers (and, by implication, Sosa) were authorized by statute to make warrantless arrests outside the United States. Because the criminal statutes under which Alvarez was charged have extraterritorial application, the argument goes, Congress must have granted DEA agents broad authority to enforce those statutes beyond our borders.

The proper starting point is, of course, the applicable statutory scheme. We begin with a well-established canon of construction. "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Amer. Oil Co. ("Aramco")*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949)). "In applying this principle, 'we assume that Congress legislates against the backdrop of the presumption against extraterritoriality.'" *Smith v. United States*, 507 U.S. 197, 204, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993) (quoting *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227). "[T]he presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.* at 204 n. 5, 113 S.Ct. 1178. The canon also "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963)).

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not hold that extraterritorial authority in this case rests on "the consent or assistance of the host country," despite the dissent's preoccupation with the subject in Section III.B. of its opinion.

The Supreme Court, in recognizing this principle, has carved out an exception for a narrow class of substantive criminal statutes. In *United States v. Bowman*, 260 U.S. 94, 43 S.Ct. 39, 67 L.Ed. 149 (1922), the Court reviewed a criminal fraud provision used to indict individuals who committed acts on a U.S. vessel outside of American territorial waters. The Court reiterated its presumption that, in most cases, if a substantive criminal provision is to be applied extraterritorially, "it is natural for Congress to say so in the statute." *Id.* at 98, 43 S.Ct. 39. But the Court found that "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." *Id.*

We have no doubt that the substantive criminal statutes under which Alvarez was charged apply to acts occurring outside the United States. Invoking the rules of construction just described, we reasoned in *United States v. Vasquez-Velasco*, 15 F.3d 833, 839-41 (9th Cir.1994), that 18 U.S.C. § 1959, the racketeering statute under which Alvarez was indicted, applied extraterritorially. Later, we applied the same principles to conclude that "Congress intended to apply statutes proscribing the kidnapping and murder of DEA agents extraterritorially." *Felix-Gutierrez*, 940 F.2d at 1204.

These cases reinforce the established proposition that certain criminal statutes are applicable to conduct occurring outside of the borders of the United States. It was precisely this principle of extraterritoriality that led the Supreme Court to conclude that Alvarez could be tried in the United States. *Alvarez II*, 504 U.S. at 657 & n. 1, 112 S.Ct. 2188. And it is this same concept that is invoked in case after case to assert jurisdiction over defendants-whether United States or foreign nationals-for criminal conduct occurring outside of the United States. *See, e.g., United States v. Neil*, 312 F.3d

419, 421-23 (9th Cir.2002) (applying extraterritoriality principle to bring citizen of St. Vincent and the Grenadines to trial in U.S. for sexual assault on cruise ship in Mexican territorial waters after cruise ship landed in U.S.); *United States v. Hill, 279* F.3d 731, 739-40 (9th Cir.2002) (applying harboring statute extraterritorially to bring to trial wife of violator of Deadbeat Parents Punishment Act arrested in U.S.); *Chua Han Mow v. United States*, 730 F.2d 1308, 1311-12 (9th Cir.1984) (applying drug importation and distribution statutes extraterritorially to prosecute Malaysian defendant extradited to U.S.); *Yousef*, 327 F.3d at ___ - ___, 2003 U.S.App. LEXIS 6437, at *29-*45 (applying provisions of the Destruction of Aircraft Act extraterritorially to conduct of terrorists who, after being arrested by Philippine and Malaysian police and later turned over to the FBI, were prosecuted for their participation in a conspiracy to bomb United States commercial airliners in Southeast Asia).[25]

This proposition is not, however, the same as the far-reaching principle advocated by Sosa and the government, namely that a statute with extraterritorial application automatically carries with it the authority for United States agents to detain and arrest suspects worldwide. Extra-

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[25] Congress has extended the United States' substantive criminal jurisdiction extraterritorially in a host of statutes, all of which state clearly their jurisdictional reach. *See, e.g.*, 18 U.S.C. § 1119 (murder of U.S. national in a foreign country); 18 U.S.C. § 2332b (foreign terrorist activity in the U.S.); 18 U.S.C. §§ 1512(h), 1513(d) (witness tampering); 18 U.S.C. § 175 (use of biological weapons); 18 U.S.C. §§ 351, 1751 (crimes committed against high government officials); 18 U.S.C. § 1956 (money laundering); 18 U.S.C. § 2339B (assistance to foreign terrorist organizations); 18 U.S.C. § 1203(b)(1) (implementing Hostage Convention); 50 U.S.C. § 424 (extraterritorial jurisdiction over crimes relating to disclosure of national security information); 18 U.S.C. § 32(b) (violence against individual aboard or destruction of any "civil aircraft registered in a country other than the United States while such aircraft is in flight" or in service).

territorial *application*, in other words, does not automatically give rise to extraterritorial *enforcement* authority. Such a leap is too facile. That Congress may have intended the reach of a criminal statute to extend beyond our borders does not mean that Congress also intended to give federal law enforcement officers unlimited authority to violate the territorial sovereignty of any foreign nation to enforce those laws, or to breach international law in doing so. *Bowman* does not countenance such an extension, and our cases have never so held.[26]

In *Bowman*, the Supreme Court focused on the nature of the criminal conduct as a guide to determining the territorial reach of criminal statutes, but balanced that concern against limitations imposed by international law. The Court stated that "[t]he necessary locus, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations." 260 U.S. at 97-98, 43 S.Ct. 39. The Court repeatedly made reference to "the locus of the offense [ ]" and "the locus of [the] crime . . . in a foreign country," not to extraterritorial enforcement powers of the United States authorities. *Id.* at 97, 99, 43 S.Ct. 39. The court also emphasized that, by extending the reach of the substantive criminal statutes at issue, it was not imposing upon the sovereignty of other states.[27] *Id.* at 102-03, 43 S.Ct. 39.

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[26] This basic distinction between the reach of the substantive criminal laws and the reach of law enforcement makes imminent sense in light of the myriad ways in which the United States regularly achieves lawful custody of persons located abroad. The options are many, ranging from purely formal means-such as extradition pursuant to a treaty or local statute, formal deportation, and revocation of passports—to purely diplomatic tactics, such as informal deportation and negotiation. *See Abbell, supra*, § 7-2, at 7-14-7-17.

[27] The Court noted that because three of the defendants charged were citizens of the United States and were found in New York, "it is no

Similarly, when we interpreted the criminal statutes for which Alvarez was indicted extraterritorially, we did so only with regard to the location of the conduct at issue. And even then we did so cautiously to ensure that we did not unnecessarily impinge on the sovereignty of other states or ignore accepted principles of international law. *See Vasquez-Velasco*, 15 F.3d at 839-40; *Felix-Gutierrez*, 940 F.2d at 1205-06; *Chua Han Mow*, 730 F.2d at 1311-12.

Taking the extraterritorial application of the applicable criminal laws as a given, the question then becomes whether Congress has separately authorized the unilateral, extraterritorial *enforcement* of those provisions in a foreign country by agents of the United States. The United States insists that such authority can be found in a provision in the Controlled Substances Act, 21 U.S.C. § 878, which grants certain powers to DEA and other law enforcement personnel.[28]

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offense to the dignity or right of sovereignty of Brazil to hold them for this crime." *Bowman*, 260 U.S. at 102, 43 S.Ct. *39*. The Court expressly reserved the question whether the United States had jurisdiction over the fourth defendant, a citizen of Great Britain. *Id.* at 102-03, 43 S.Ct. 39.

[28] Section 878 of the Act provides:

> (a) Any officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General may—
>
> (1) carry firearms;
>
> (2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States;
>
> (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

Subsection 878(a)(3) of that provision authorizes DEA agents to make warrantless arrests on probable cause for suspected felony violations. 21 U.S.C. § 878(a)(3). Although this subsection grants DEA agents felony arrest power, no language in the statute provides, or even suggests, that Congress intended that power to extend outside the borders of the United States. Given that the provision applies to DEA agents as well as "any State or local law enforcement officer designated by the Attorney General," it would in fact be anomalous to read subsection (3) as the statutory basis for a geographically limitless arrest power. Nor can such power be found in the catchall language of subsection (5), which states that DEA agents, as well as designated state and local officials, may "perform such other law enforcement duties as the Attorney General may designate." 21 U.S.C. § 878(a)(5). Again, nothing in the text of the statute remotely indicates that Congress sought to extend DEA arrest authority to any territory outside American borders.

Although legislative silence is not necessarily dispositive, these provisions must be construed against the backdrop of *Aramco's* presumption against extraterritoriality. Even the narrow *Bowman* exception offers no safe harbor.[29] Section

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(4) make seizures of property pursuant to the provisions of this subchapter; and

(5) perform such other law enforcement duties as the Attorney General may designate.

21 U.S.C. § 878(a).

[29] We observe that *Bowman's* exception may be limited not only by its own language, but also in its application. *Aramco* did not mention *Bowman* at any point in its discussion of the presumption against extraterritoriality. We have interpreted the Court's silence as an indication that *Bowman* remains the law. *See Felix-Gutierrez*, 940 F.2d at 1205 n. 3. The Second Circuit, however, has held that *Bowman* should, at best, be interpreted narrowly. *See Kollias v. D&G Marine Maint.*, 29 F.3d 67, 71 (2d Cir.1994) ("At best . . . the holding in *Bowman* should be read narrowly so as not to conflict with these more recent pronouncements on

878(a) regulates executive authority, not criminal conduct. And this provision can hardly be classified as a "criminal statute[ ] which [is] . . . not logically dependent on [its] locality for the Government's jurisdiction." *Bowman*, 260 U.S. at 98, 43 S.Ct. 39. To hold otherwise would essentially swallow the presumption against extraterritoriality and grant, without express congressional authorization, worldwide law enforcement authority to United States officials (and to state and local officials upon designation by the Attorney General). Virtually a limitless number of statutes would have both extraterritorial reach and the prospect of extraterritorial enforcement. Surely such a result would all but eviscerate the longstanding principle that our laws generally apply only within our territorial borders.

Faced with congressional silence on the matter, the United States analogizes this case to *United States v. Chen*, 2 F.3d 330 (9th Cir.1993). The issue in *Chen* was whether agents of the Immigration and Naturalization Service acted outside their statutory authority by conducting an undercover investigation into the smuggling of Chinese aliens into the United States from international waters. The operation involved planting undercover agents on a chartered boat (the Corinthian) that rendezvoused with a Chinese ship some 320 miles off the coast of California. The agents watched and videotaped as the Chinese aliens boarded the Corinthian, keeping the aliens under surveillance during and after their entry into the United States. *Id.* at 332.

In evaluating whether the INS exceeded its statutory authority, we looked to 8 U.S.C. § 1103(a), the statute charging the Attorney General with enforcement of the Immigration and

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extraterritoriality."). Although we have implicitly rejected this latter interpretation, *see, e.g., United States v. Corey*, 232 F.3d 1166, 1170 (9th Cir.2000), the Second Circuit's concerns underscore the fact that we should not cavalierly cast aside the presumption against extraterritoriality in the face of the Supreme Court's recent jurisprudence.

Nationality Act, and determined that Congress had given the Attorney General "extremely broad powers" to administer and enforce the immigration laws by directing the Attorney General to "perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." *Chen*, 2 F.3d at 333 (citation and internal quotation marks omitted). We inferred from the broad language of § 1103(a) that "Congress intended to grant the Attorney General the corresponding power to enforce the immigration laws both within and without the borders of the United States." *Id.* We also pointed to § 1103(b), which specifically authorizes the Attorney General to delegate this broad authority to the Commissioner of the INS. Finally, we were careful to note that the Attorney General had in fact exercised this authority and had explicitly delegated her broad enforcement powers to the Commissioner under 8 C.F.R. § 2.1. *Id.* at 334. This chain of authority, we reasoned, provided "the legal basis for the INS and its agents to undertake offshore undercover investigations such as this one." *Id.*

But this case is not *Chen*. First, the INS operation in *Chen*, which consisted solely of observing and recording events, did not take place within the boundaries of another sovereign, but rather in international waters. That operation-unlike the abduction of a foreign citizen from a friendly neighbor-did not trigger any allegations of a breach of a law of nations. In fact, *Chen* did not even address international law, as traditional sovereignty concerns were not at issue. This distinction is critical, for one of the bedrock principles embodied in the presumption against extraterritoriality is that we must "protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227; *see also Kollias*, 29 F.3d at 70 (applying the same rationale). If *Chen's* expansion of INS authority to the high seas did not raise concerns about clashing with laws of another sovereign, the case before us most certainly presents that danger.

Second, the demonstrated chain of delegated authority on which *Chen* relied, extending from Congress to the Attorney General to the INS Commissioner to the INS agents, has not been shown to exist with respect to the DEA. Section 878(a)(3) does grant DEA agents broad authority to make warrantless arrests, and § 878(a)(5) does confer the authority to "perform such other law enforcement duties *as the Attorney General may designate*." 21 U.S.C. § 878(a)(5) (emphasis added). But even if *Chen* were to direct us to infer extraterritoriality from this bare language-a proposition that we do not accept-there is no evidence in this record that the Attorney General has in fact authorized the DEA Administrator to perform whatever extraterritorial enforcement powers the Attorney General may have—either generally or as to this abduction.[30]

The importance of obtaining specific authorization for extraterritorial law enforcement operations is brought into

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[30] No regulation concerning the DEA's authority is analogous to the Attorney General's delegation of authority to the INS Commissioner in 8 C.F.R. § 2.1. In any event, there is no evidence that anyone ranking higher than the DEA Deputy Administrator or the United States Attorney for the Central District of California explicitly approved the operation. In view of this delegation vacuum, perhaps it is no surprise that the Department of Justice now requires explicit advance approval for such operations:

> Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation. If a prosecutor anticipates the return of a defendant, with the cooperation of the sending State and by a means other than an *Alvarez-Machain* type rendition, and that the defendant may claim that his return was illegal, the prosecutor should consult with the OIA before such return.

Department of Justice, United States Attorneys' Manual, § 9-15.610.

sharper relief by the fact that had the INS operation in *Chen* occurred within the boundaries of a foreign nation, rather than in international waters, the Attorney General (or the Commissioner, acting under delegated authority) would have been statutorily required to consult with the Secretary of State before deploying INS agents abroad. *See* 8 U.S.C. § 1103(a)(7) ("[A]fter consultation with the Secretary of State, [the Attorney General] may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries."). Such a restriction on the Attorney General's extraterritorial enforcement power, even in an area as obviously international as immigration, is evidence that Congress did not contemplate giving field agents the authority to act unilaterally in deciding to cross the borders of a friendly nation and abduct one of its citizens over that nation's objection. If the Attorney General must consult with the Secretary of State before dispatching INS agents to foreign lands, then surely, absent explicit statutory authorization, the Deputy Administrator of the DEA is not free to take it upon himself to send agents across the border into Mexico or to hire Mexican bounty hunters to act as surrogates to abduct a suspect.

Chen thus stands for only the proposition that the INS possesses limited delegated authority to conduct an operation on the high seas. At no point did we hold or even suggest that Congress has given license to the executive branch to violate international law in the course of enforcing criminal statutes that have extraterritorial reach. And surely *Chen* does not support the proposition that Congress has *sub silencio* delegated to the executive branch the authority to unilaterally enter a friendly nation and abduct one of its citizens in violation of international law.

Reading a generally worded statute like 21 U.S.C. § 878(a)(5) as evidence that Congress has given the DEA carte blanche to effectuate arrests within any sovereign state

would require us to make the untenable assumption that Congress, in drafting such a statute, turned a blind eye to the interests of equal sovereigns and the potential violations of international law that would inevitably ensue.[31] This we cannot do. *See McCulloch*, 372 U.S. at 21, 83 S.Ct. 671 (1963) ("'[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains.'" (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64,2 L.Ed. 208 (1804))).

We are not suggesting that Congress lacks the power to enact laws authorizing extraterritorial law enforcement powers. Nor do we question the powers of the political branches to override the principles of sovereignty in some circumstances, should the need arise. Rather, we are simply saying that we cannot impute such an intent where it is not expressed, and Congress has expressed no such intent here.[32]

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[31] Congress is well aware of the importance of respecting territorial sovereignty, and it has shown caution in expanding extraterritorial jurisdiction at the expense of this obligation. For instance, in passing the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, 22 U.S.C. § 4801 *et seq.*, Congress refused to adopt a provision authorizing "self-help" measures. *See Bills to Authorize Prosecution of Terrorists and Others Who Attack US. Government Employees and Citizens Abroad. Hearing on 5.1373, S. 1429, and S. 1508, Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 63 (1985). Similarly, in passing the Anti-Drug Abuse Act of 1986, Congress required the Coast Guard to obtain foreign flag consent to board a foreign flag vessel on the high seas. Pub. L. No. 99-570, § 2015, 100 Stat. 3207, 3268 (repealed 1994).

[32] The dissent believes we should ignore well-established principles of statutory construction and give Congress the benefit of the doubt because we have recognized that "[d]elegation of foreign affairs authority is given . . . broader deference than in the domestic arena." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438 (9th Cir.1996). But *Freedom to Travel* and the other non-delegation cases cited by the dissent are inapplicable here. We have no quarrel with the position that Congress, in giving the Executive authority over matters of foreign affairs, may

Congress has shown that it is quite capable of making clear when arrest powers should have extraterritorial effect. *See Aramco*, 499 U.S. at 258, 111 S.Ct. 1227 ("Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute."). In defining the law enforcement powers of the Coast Guard, for example, Congress provided that "[t]he Coast Guard may make . . . arrests upon the high seas and waters over which the United States has jurisdiction." 14 U.S.C. § 89(a). The powers of customs officials on the high seas have likewise been clearly articulated. *See* 19 U.S.C. § 1701 (permitting customs officials to seize or arrest in those areas of the high seas designated as customs-enforcement areas by the President).

More recently, in the Military Extraterritorial Jurisdiction Act of 2000,[33] Congress included clear and separate provisions pertaining both to the extraterritorial scope of the substantive crime *and* the executive agency's power to arrest. Section 3261(a), relating to certain members and employees of the Armed Forces, addresses the extraterritorial scope of the substantive crime:

> Whoever *engages in conduct outside the United States* that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial

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delegate authority through broad (albeit not limitless) directives. *See Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). Rather, we are simply saying that there is no evidence in the applicable statutory scheme that Congress ever granted the DEA the power to conduct arrests abroad. Hence, we do not address whether 21 U.S.C. § 878 is an impermissible delegation of congressional power.

[33] This legislation was quickly enacted in response to the Second Circuit's decision in *United States v. Gatlin*, 216 F.3d 207 (2d Cir.2000), which highlighted a gap in prosecutions of civilian personnel living abroad with the military.

> jurisdiction of the United States . . . shall be punished as provided for that offense.

18 U.S.C. § 3261(a) (emphasis added). Section 3262(a), pertaining to "arrest and commitment," explicitly lays out the scope of arrest powers:

> The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense *to arrest*, in accordance with applicable international agreements, *outside the United States* any person described in section 3261(a) [of the Act] if there is probable cause to believe that such person violated section 3261(a).

18 U.S.C. § 3262(a) (emphasis added).[34] If Congress thought it could rely on courts to supply extraterritorial scope through searching interpretations of vague statutes, no such language would be necessary.

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[34] The government points to other statutes pertaining to the military's powers overseas, such as 10 U.S.C. § 374(b)(1)(D) and 18 U.S.C. § 351, arguing that these provisions "plainly envision foreign law enforcement activity." We agree. These statutes underscore the point that Congress is clear when it wishes to be. Section 374(b)(1)(D) allows the Secretary of Defense, upon the request of a federal law enforcement agency, to make defense personnel available "to operate equipment" with respect to "a rendition of a suspected terrorist from a foreign country to the United States to stand trial." Section 351 allows the FBI to request assistance from the military, as well as "any Federal, State, or local agency," in "investigat[ing]" kidnappings or assassinations of Congressional, Cabinet, and Supreme Court members. Not only do these statutes not speak to military arrest powers, but they define the universe (e.g., operating equipment or assisting in investigation) in which Congress has chosen to involve the military in law enforcement overseas. Section 374(b)(1)(D) is one of a number of provisions, along with the Posse Comitatus Act, 18 U.S.C. § 1385, that actually limit military involvement in civilian law enforcement operations. In considering 10 U.S.C. §§ 371-80, we concluded that "these sections impose limits on the use of American armed forces abroad." *United States v. Khan*, 35 F.3d 426, 431 n. 6 (9th Cir. 1994).

Wishful thinking is no substitute for clear congressional authority. Congress surely knows how and when to expand the reach of its laws beyond our borders. There is little doubt that Congress has the authority to do so; there is also little doubt that it has not done so here. Thus, although we recognize that the kidnapping and murder of DEA agents abroad necessitates the exercise of extraterritorial criminal jurisdiction, absent a clear directive, we cannot conclude that Congress has given the DEA unlimited enforcement powers abroad. Finding no basis in law for the DEA's actions, and left only with a warrant issued by a United States court, we conclude that Alvarez's arrest, and hence his detention, were arbitrary because they were not "pursuant to law." Consequently, Alvarez established a tort committed in violation of the law of nations.

II. ALIEN TORT CLAIMS ACT—SUBSTITUTION OF THE UNITED STATES FOR THE DEA AGENTS

We next consider whether the district court appropriately substituted the United States for the individual government defendants. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (the "Westfall Act"), 28 U.S.C. § 2679, provides that, for civil actions arising out of the wrongful act of a federal employee acting within the scope of his official duties, the United States is to be substituted as a defendant and the claims may proceed only under the FTCA. 28 U.S.C. § 2679(b)(1). This exclusive remedy provision does not apply, however, in an action "which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). Alvarez argues that the ATCA falls within this exemption.

But we agree with the three judge panel's conclusion that the exemption does not apply here, and that the United States was properly substituted for the individual DEA agents.

Alvarez-Machain IV, 266 F.3d at 1053. Accordingly, we adopt the relevant portion of that opinion:

> The district court held that an action under the ATCA was not exempt from the exclusive remedy provision of the Liability Reform Act. It reasoned that "it is international law, not the ATCA," that gives individuals fundamental rights. Therefore, a claim under the ATCA is based on a violation of international law, not of the ATCA itself.
>
> This reading is consistent with the Supreme Court's reasoning in *United States v. Smith*, 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991). In *Smith*, the Court rejected the argument that a claim for medical malpractice was "authorized" by the Gonzalez Act and therefore fit the 28 U.S.C. § 2679(b)(2)(B) exception for violations of a statute. The court explained: "[n]othing in the Gonzalez Act imposes any obligations or duties of care upon military physicians. Consequently, a physician allegedly committing malpractice under state or foreign law does not 'violate' the Gonzalez Act." *Smith*, 499 U.S. at 174, 111 S.Ct. 1180.[35] The same can be said of the ATCA. The language of § 1350 creates no obligations or duties. Admittedly, the ATCA differs from the Gonzalez Act in that it creates a cause of action for violations of international law, whereas the Gonzalez Act limited the common law liability of doctors. *See*

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[35] The relevant provision of the Gonzalez Act provides:

> The remedy against the United States provided by [the FTCA] for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician . . . of the armed forces . . . while acting within the scope of his duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician . . . whose act or omission gave rise to such action or proceeding.

10 U.S.C. § 1089(a) (1994).

> *Marcos II*, 25 F.3d at 1475 (rejecting the argument that the ATCA is merely jurisdictional); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir.1996); *Filartiga*, 630 F.2d at 885-86. Nonetheless, we find nothing in this distinction to cause us to deviate from the plain language of the statute. We therefore agree with the district court that Alvarez's claims under the ATCA were subject to substitution under the Liability Reform Act. Accordingly, Alvarez's exclusive remedy against the United States, in lieu of the DEA agents, is through the FTCA.

Id. at 1053-54.

Because the United States is substituted for the DEA agents, we treat the claims brought against the agents within the context of the FTCA. *See* § IV *infra*.

III. ALIEN TORT CLAIMS ACT—DAMAGES

A. CHOICE OF LAW

In addressing the matter of damages related to Sosa's liability under the ATCA, we must first determine the applicable substantive law. We review de novo the district court's decision concerning the appropriate choice of law. *Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir.2000).

Two obvious choices present themselves in this cross-border dispute: the domestic law of the United States and that of Mexico. The district court chose to apply federal common law, rather than Mexican law, in fashioning a damages award for Sosa's ATCA violations. The court reasoned that Mexican law would "inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States." *Alvarez-Machain v. United States*, No. 93-4072, slip op. at 33 (Sept. 9, 1999) (quoting *Filartiga v. Pena-Irala ("Filartiga II")*, 577 F.Supp. 860, 864 (E.D.N.Y. 1984)).

The precise issue before us, the choice of law for damages under the ATCA, is one of first impression. In *Marcos III*, we construed the district court's award of exemplary damages as having embraced Philippine law and concluded that this was not an error because such damages were allowed under Philippine law. 103 F.3d at 779-80. Our holding in *Marcos III*, however, went no further. We did not review the district court's choice of law analysis or enumerate the circumstances in which foreign law would apply. *See id.* (noting that there was "no ruling by the district court expressly choosing Philippine law").

The few courts that have addressed damages under the ATCA do not appear to have followed a consistent approach in determining the applicable law. Perhaps the most explicit treatment of the issue was offered by the district court in the *Filartiga* litigation. When faced with the question of damages on remand, the district court decided, in light of the ATCA's purpose, that federal choice of law principles should govern the initial determination of the remedy. *See Filartiga II*, 577 F.Supp. at 863. Applying these principles in the broadest of terms, the court noted that virtually all of the contacts took place in Paraguay, and thus Paraguayan law appeared to be appropriate for setting compensatory damages. *Id.* at 863-64. The court took a different tack, however, on punitive damages. Because Paraguay did not recognize punitive damages, which were deemed necessary "to give effect to the manifest objectives of the international prohibition against torture," the court turned to international law principles. *Id.* at 865.

Other courts awarding damages in the wake of *Filartiga II* have adopted a number of approaches. Most courts have not directly addressed the choice of law dilemma, while others have offered variations on the *Filartiga II* theme. *See, e.g., Tachiona v. Mugabe*, 234 F.Supp.2d 401, 418-22 (S.D.N.Y. 2002) (addressing the choice of law issue, but abandoning a

traditional choice of law analysis in favor of a more "flexible" approach for determining both substantive rights and remedies); *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1358-59 (N.D.Ga.2002) (conducting no choice of law analysis but making repeated references to "international law" in awarding both compensatory and punitive damages); *Xuncax*, 886 F.Supp. at 183, 198 (using an analysis similar to that of *Tachiona); Avril*, 901 F.Supp. at 335 (citing *Filartiga II* for the position that both compensatory and punitive damages are available but providing no indication as to which law was applied).[36]

Mindful of this varied landscape, we begin our inquiry with a traditional choice of law analysis. As the Supreme Court has counseled, "[c]hoice of law is, of course, determined by the forum jurisdiction," *Zicherman*, 516 U.S. at 228-29, 116 S.Ct. 629, which in this case is federal court. Federal question jurisdiction was predicated on the ATCA and thus federal common law applies to the choice-of-law determination. *See Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997) (holding that federal common law applies to choice-of-law determination in federal question case).[37] Under federal common law, we look to the

[36] It bears noting that most of the cases addressing damages under the ATCA have done so without the benefit of, or without reference to, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 229, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996), in which the Supreme Court interpreted the damages provisions of the Warsaw Convention and concluded that it does not "empower us to develop some common-law rule-under cover of general admiralty law or otherwise-that will supersede the normal federal disposition." The Court held that the Convention "provide[d] nothing more than a pass-through, authorizing us to apply the law that would govern in the absence of the Warsaw Convention," which in that case was the Death on the High Seas Act, 46 U.S.C.App. § 761. *Zicherman*, 516 U.S. at 229, 116 S.Ct. 629.

[37] Although the Second Circuit observed in *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir.1996), that "the law is

Restatement (Second) of Conflict of Laws ("Restatement of Conflicts") for guidance. *Schoenberg v. Exportadora de Sal, S.A.*, 930 F.2d 777, 782 (9th Cir.1991) (explaining, in the context of the Foreign Sovereign Immunities Act, that "[f]ederal common law follows the approach of the Restatement (Second) of Conflict of Laws"); *see also Bickel v. Korean Air Lines Co.*, 83 F.3d 127, 130 (6th Cir.1996) (noting, in the context of the Warsaw Convention, that "[i]n the absence of any established body of federal choice of law rules, we begin with the Restatement (Second) of Conflict of Laws. . . .").

Section 145[38] of the Restatement, which delineates the general principles applicable to torts, states that the "rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6."[39] The section continues by listing the following

unsettled when it comes to applying either a federal common law choice of law rule or state choice of law principles in non-diversity cases," we believe that both *Zicherman* and our precedent support the application of federal common law conflicts principles.

[38] Sosa urges us to look to § 146 of the Restatement which provides, with respect to personal injury actions, that there is a presumption in favor of applying "the local law of the state where the injury occurred," which in this case was Mexico. But the tort here-arbitrary arrest and detention as a recognized violation of international law-is not a classic personal injury claim. Nor does Alvarez's claim "involve either physical harm or mental disturbance . . . resulting from physical harm" as envisioned by § 146. Restatement of Conflicts § 146 cmt. b. Finally, the presumption is not absolute and other considerations weigh in favor of applying United States law.

[39] The factors in § 6 include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

"contacts" that should "be taken into account in applying the principles of § 6 to determine" the state with the "most significant relationship":

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.

Id. § 145(2).

These principles are meant to serve as a guide for consideration of competing policy choices. The factors, coupled with the contacts, are not necessarily of equal weight, nor do they lend themselves to a bean-counting exercise in which everything is lined up on a ledger and the answer emerges. Indeed, as noted in the comment, "[a]t least some of the factors . . . will point in different directions in all but the simplest case." *Id.* § 6 cmt. c. This international dispute illustrates in practical terms the reality of that admonition. In a claim based on a universal, international standard, it may seem presumptuous to choose the law of one country over another. Admittedly, the needs of the international system are often too complex to dictate a clear choice, in part because our task is limited to a legal analysis and we leave foreign policy to the Executive branch and the diplomats.

> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Id. § 6(2).

Nonetheless, we are driven to make a choice so that damages may be assessed in accord with the substantive law of a chosen jurisdiction.

Stepping back and looking at the overall picture, we view this case as a series of events that began and ended in the United States, and which are inextricably intertwined with the United States government. The United States' interests are particularly pointed here: the United States itself is a party, and it is the conduct of the United States government, in its efforts to bring a suspect to justice, that spawned the international incident. The genesis of the crucial events was a federal criminal prosecution of Alvarez in Los Angeles. DEA agents working in the United States devised a plan, which they hired Sosa to carry out, and without which the tort would not have occurred. Sosa acted according to DEA instructions when he helped detain Alvarez and transport him to the United States for trial. Sosa himself had no justifiable expectation that Mexican law would apply, particularly because he was employed as an agent of the American government, and because this is a tort, rather than a contract, case. The relationship between Sosa and Alvarez was intimately connected with, and a direct product of, the interests of the United States government. Just as importantly, the tort is predicated on an arrest and detention that were arbitrary because the agents exceeded the scope of their authority under United States law.

As Sosa points out, some of the Restatement factors weigh in favor of applying Mexican law. Alvarez's actual arrest occurred in Mexico. Both Alvarez and Sosa were Mexican citizens and residents at the time of the events in question (although Sosa later moved to the United States). As a result, Mexico may in fact have competing interests-seeking to obtain compensation for its citizen, Alvarez, while limiting damages from Sosa, another of its citizens.

Nonetheless, we must also take into account the policy of the United States, as expressed in the ATCA, to provide a remedy for violations of the law of nations. *See Marcos II*, 25 F.3d at 1475. We agree with the district court that limitations on damages under Mexican law—including the unavailability of punitive damages—are not consistent with the congressional policy that underlies the ATCA.

After weighing these factors, we conclude that the relative importance of United States contacts and interests counsels in favor of applying United States law. Our ruling today does not foreclose the application of foreign law in another circumstance; it is simply the appropriate outcome given the factors and policies present in this suit.

Our choice of law conclusion brings us to another level of inquiry: In applying United States law, should we apply federal common law or the law of California? We are aware of the Supreme Court's view that we should not reach out to extend federal common law. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83-84, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) (explaining the presumption in favor of incorporating state law to provide the content of federal common law, and that "a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards . . . or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand. . . .").

On the other hand, because the ATCA invokes international law principles of universal concern, it holds a unique place among federal statutory tort causes of action, and

application of federal common law is therefore appropriate.[40] *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (observing that, in "international disputes implicating . . . relations with foreign nations . . . our federal system does not permit the controversy to be resolved under state law" because the "international nature of the controversy makes it inappropriate for state law to control"); *see also Sabbatino*, 376 U.S. 398, 427 n. 25, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (noting that the ATCA is an example of a statute reflecting a "concern for uniformity in this country's dealings with foreign nations").

B. SCOPE OF DAMAGES

The district court determined that Alvarez could recover damages only for activities taking place prior to the point that United States law enforcement authorities took him into custody, not for the entire period in which he was imprisoned in the United States. We review this question of law de novo. *See United States v. Stephens*, 237 F.3d 1031, 1033 (9th Cir.2001).

There is no established body of case law applying federal common law to determine the proper scope of damages for arbitrary arrest and detention. Although several federal cases have awarded damages for this brand of international law violation, none of those cases dealt with the unique set of facts presented here. *See, e.g., Xuncax*, 886 F.Supp. at 19798 (awarding damages for arbitrary detention authorized by Guatemala's Minister of Defense). Even so, we agree with the district court that existing principles governing false arrest provide adequate guidance.

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[40] Although we apply federal common law, we note that, as discussed below, the result would be the same under state law.

In the context of law enforcement, the federal courts are largely in accord that, consistent with the principles of tort law, the chain of causation set in motion by the initial act of misconduct of one actor can be broken by the acts of a third party. For example, police officers have been held to be insulated from liability for deprivations of liberty where there are independent, intervening acts of other decision-makers in the criminal justice system, such as prosecutors, grand juries, or judges. *See Heck v. Humphrey*, 512 U.S. 477, 484, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) ("'If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more.'" (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser & Keeton on the Law of Torts* 888 (5th ed. 1984))); *Townes v. City of New York*, 176 F.3d 138, 147 (2d Cir.1999) (holding that the trial judge's independent decision not to suppress evidence, though erroneous, broke the chain of causation for purposes of police officer's liability); *Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir.1989) (holding that intervening acts of prosecutor, grand jury, and judge broke chain of causation); *Hand v. Gary*, 838 F.2d 1420, 1427-28 (5th Cir.1988) (holding that a sheriff's actions were not the proximate cause of damages given intervening acts of federal agents, federal prosecutors, and grand jury). In this connection, we have held that the "[f]iling of a criminal complaint immunizes investigating officers . . . from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time." *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir.1981).[41]

[41] Our holding in *Smiddy* was limited. We concluded that the presumption that the prosecutor exercised independent judgment can be rebutted by, for instance, "a showing that the [prosecutor] was pressured or caused by the investigating officers to act contrary to his independent judgment," or by "the presentation by the officers to the [prosecutor] of information known by them to be false." 665 F.2d at 266-67.

These principles of proximate causation, taken in combination with the Supreme Court's holding in *Alvarez-Machain II*, guide us in assessing the scope of Sosa's liability. Sosa's participation in Alvarez's arrest and detention in this case took place almost solely within the confines of Mexico. Although he was guided by the unlawful directives of American DEA agents, once he delivered Alvarez to United States authorities in El Paso, the actions of domestic law enforcement set in motion a supervening prosecutorial mechanism which met all of the procedural requisites of federal due process and ultimately received the blessing of the United States Supreme Court. *See Alvarez-Machain II*, 504 U.S. at 669-70, 112 S.Ct. 2188. To be sure, a grand jury had already indicted Alvarez and an American arrest warrant had been issued by the time Sosa was hired, giving this case a unique factual twist when compared to traditional false arrest cases. But, as we have explained, these procedural formalities stand apart from the illegitimacy that characterized Alvarez's initial arrest and detention, and came into operation only at the moment Alvarez set foot on U.S. soil. At that point, the criminal justice system, with proper jurisdiction, began its march toward trial and the chain of causation linked to Sosa's actions was broken, thus limiting Sosa's liability for damages.

Because the district court cited California law for its damages analysis, the parties focus on the nuances of California law, despite framing the issue in terms of choosing either federal common law or Mexican law. Applying California law, however, yields the same result. The California Supreme Court recently rejected a plaintiff's claim of false imprisonment for the entire time he was held in custody. *See Asgari v. City of Los Angeles*, 15 Cal.4th 744, 63 Cal.Rptr.2d 842, 937 P.2d 273, 281 (1997). Relying on state statutes, the court explicitly distinguished the rebuttable presumption rule of *Smiddy*, clarifying that a police officer's liability for false arrest could not, even with a showing of bad faith, include

damages caused by incarceration following arraignment because that result would thwart the applicable statutes' directives. *Id.* at 279.

Alvarez seeks to distinguish *Asgari* by arguing that it is a narrow holding based only on immunity principles grounded in the California Tort Claims Act, specifically Cal. Gov.Code § § 820.4 and 821.6. Instead, he urges us to rely on an earlier case, *Gill v. Epstein*, 62 Cal.2d 611, 44 Cal.Rptr. 45, 401 P.2d 397 (1965), which held, prior to the enactment of the above provisions, that a plaintiff could recover damages arising from his incarceration after his arraignment because the arraignment was not an independent act that could break the chain of causation. *Id.* at 401. But *Gill* does not help Alvarez. In *Gill,* the plaintiff was arrested without a warrant, and the case was dismissed at a preliminary hearing five days after the arraignment. *Id.* at 398-99. The court held that the plaintiff could recover for damages up until the time an independent judgment was made as to probable cause for his arrest. *See id.* at 401. Here, there is no question that at the time Alvarez was arrested, an independent judgment had already been made that he should be brought to trial.[42] As a result, Alvarez is entitled to damages only to the point at which he was handed over to U.S. authorities.

IV. FEDERAL TORT CLAIMS ACT

The FTCA acts as a limited waiver of the sovereign immunity of the United States for certain torts committed by its employees. 28 U.S.C. §§ 1346(b), 2674. The statute

[42] Although we decline to speak for the California Supreme Court as to the status of *Gill* after *Asgari*, we note also that in *Asgari* the court looked not only to statutory immunity principles but also to the broader proximate cause principles articulated in New York's *Broughton* rule, which measures liability only up to the time of arraignment or indictment, whichever comes first. *See Asgari*, 63 Cal.Rptr.2d 842, 937 P.2d at 281 n. 10 (citing *Broughton v. State*, 37 N.Y.2d 451, 373 N.Y.S.2d 87, 335 N.E.2d 310, 316 (1975)).

provides that the United States shall be "liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. At issue here is whether Alvarez's claims fit within the FTCA's waiver provision or instead fall specifically within any of the statutory exclusions to FTCA jurisdiction-in particular, the "foreign activities" exception or the "intentional tort" exception.

The United States argues that Alvarez's kidnapping lies outside the jurisdiction of the FTCA. But we agree with the district court that neither exception applies.

A. "FOREIGN ACTIVITIES" EXCEPTION

The foreign activities exception bars recovery for "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). Its purpose is "to ensure that the United States is not exposed to excessive liability under the laws of a foreign country over which it has no control." *Nurse v. United States*, 226 F.3d 996, 1003 (9th Cir.2000). The district court held that many of Alvarez's claims, such as assault and the resulting infliction of emotional distress, derived from acts that took place entirely in Mexico and so were excluded under the ATCA. Alvarez does not appeal that decision.

But the district court permitted other claims-false arrest, false imprisonment, and the resulting infliction of emotional distress-to go forward under the "headquarters doctrine." Because "[t]he entire scheme of the FTCA focuses on the place where the negligent or wrongful act or omission of the government employee occurred," *Sami v. United States*, 617 F.2d 755, 761 (D.C.Cir.1979), a claim can still proceed under the headquarters doctrine if harm occurring in a foreign country was proximately caused by acts in the United States. *See Nurse*, 226 F.3d at 1003; *see also Cominotto v. United States*, 802 F.2d 1127, 1130 (9th Cir.1986) (holding that an FTCA claim arises where an act or omission occurs and "not

necessarily at the site of the injury or the place where the negligence has its operative effect" (internal quotation marks omitted)).

The quintessential headquarters claim involves federal employees working from offices in the United States to guide and supervise actions in other countries. *See Nurse*, 226 F.3d at 1003 (applying the doctrine to FTCA claims made by a Canadian detained in Vancouver, British Columbia, against the U.S.-based Customs officials who trained the Vancouver agents); *Couzado v. United States*, 105 F.3d 1389, 1395-96 (11th Cir. 1997) (applying the doctrine to claims against DEA agents in the United States who coordinated an arrest in Honduras); *Sami*, 617 F.2d at 761-63 (applying the doctrine to claims against the Chief of the United States National Central Bureau in Washington, D.C., who sent messages causing an improper arrest in Germany). In evaluating whether the headquarters doctrine applies, we look to the law of the state where the alleged act occurred-in this case, California. *See* 28 U.S.C. § 1346(b)(1); *Couzado*, 105 F.3d at 1395 (applying Florida law to determine whether the doctrine applies to alleged negligence by DEA officials who were based in Florida and caused harm in Honduras).

Alvarez's abduction fits the headquarters doctrine like a glove. Working out of DEA offices in Los Angeles, Berellez and his superiors made the decision to kidnap Alvarez and, through Garate, gave Barragan precise instructions on whom to recruit, how to seize Alvarez, and how he should be treated during the trip to the United States. DEA officials in Washington, D.C., approved the details of the operation. After Alvarez was abducted according to plan, DEA agents supervised his transportation into the United States, telling the arrest team where to land the plane and obtaining clearance in El Paso for landing. The United States, and California in particular, served as command central for the operation carried out in Mexico.

By contrast, we see little resemblance to the facts of *Cominotto*, in which we rejected the DEA informant's headquarters claim because he had disobeyed Secret Service orders by jumping into the suspects' car late one night in Bangkok. 802 F.2d at 1130. Alvarez did little but serve as an unsuspecting target of an operation planned in the United States. Under California law, negligent or criminal acts carried out by Alvarez's abductors in furtherance of the objectives given to them by American DEA agents "do not break the causal link between" the conduct of the DEA agents and Alvarez's injuries. *Vickers v. United States*, 228 F.3d 944, 956 (9th Cir.2000). The arrest team's seizure of Alvarez was not the interruption, but the fulfillment, of the DEA agents' tortious acts. The events for which Alvarez seeks relief occurred precisely as the DEA intended.

The United States offers little to support its alternative argument that, even if applicable, the headquarters doctrine does not apply to intentional torts. We see no valid reason to distinguish between negligence and intentional torts when the purpose of the doctrine is to hold the federal government responsible where the plaintiff's injuries are proximately caused by conduct in the United States. *Sami*, 617 F.2d at 762 (noting that examination of the legislative history shows that the foreign activities exception "does not apply if the *wrongful acts or omissions* complained of occur in the United States" (emphasis added)). We hold that the headquarters doctrine applies to both negligence and intentional torts. Alvarez's kidnapping claim therefore does not fall within the foreign activities exception.

B. "INTENTIONAL TORT" EXCEPTION

We also agree with the district court that Alvarez's claims do not fall within the "intentional tort" exception to the

FTCA. *See* 28 U.S.C. § 2680(h).[43] Although the waiver of sovereign immunity under the FTCA excludes intentional torts such as false arrest, this exclusion is followed by an important proviso: It does not apply if the intentional tort is committed by an "investigative or law enforcement officer." *Id. See also Orsay v. United States Dept of Justice*, 289 F.3d 1125, 1134 (9th Cir.2002) (noting that Congress chose "to single out investigative and law enforcement officers from other federal employees" because their "authority to use force and threaten government action carries with it the risk of abuse, or the risk of intentionally tortious conduct").

The DEA agents who orchestrated Alvarez's arrest are law enforcement officers as defined by the FTCA because they are "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). Because the primary tortious act was the initiation and planning of Alvarez's abduction by the DEA agents, his claim falls squarely within this law enforcement proviso, and thus the intentional tort exclusion does not apply.

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[43] The Act provides an exception for

> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

The purpose of the law enforcement proviso in § 2680(h) is to "provid[e] a remedy against the Federal Government for innocent victims of Federal law enforcement abuses." *Orsay*, 289 F.3d at 1134-35 (quoting S.Rep. No. 93-588, 93d Cong., 2d Sess. 3 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 2789, 2792 (1974)). As the original threejudge panel put it, this purpose would be manifestly frustrated if law enforcement officers could avoid liability by recruiting civilians "to do their dirty work." *Alvarez-Machain IV*, 266 F.3d at 1056.

Because neither the "foreign activities" exception nor the "intentional tort" exception applies, we proceed to the merits of Alvarez's false arrest claim under the FTCA.

C. FALSE ARREST CLAIM

The parties agree that if no exception applies, California law determines whether and to what extent the United States is liable. *See* 28 U.S.C. § 1346(b)(1). Because "[u]nder California law, a California court would apply federal law to determine whether an arrest by a federal officer was legally justified and hence privileged," the United States' liability hinges on whether federal employees "complied with applicable federal standards" in seizing Alvarez. *Rhoden v. United States*, 55 F.3d 428, 431 (9th Cir.1995) (per curiam). The government argues that there is no California false arrest because federal law authorized Alvarez's apprehension in Mexico. Our earlier discussion of liability under the ATCA applies with equal force to our analysis of the FTCA claims against the United States. The DEA agents had no authority under federal law to execute an extraterritorial arrest of a suspect indicted in federal court in Los Angeles. *See supra* at § I.B.2.

Notwithstanding the fact that California law looks to federal law to determine the lawfulness of an arrest by federal officers, the district court concluded that Alvarez's abduction

could still be justified as a citizen arrest under California law. The United States urges us to reach the same conclusion, arguing that, in certain situations, California's citizen arrest provision authorizes federal agents to make arrests even where federal authority is lacking.[44] *See United States v. DeCatur*, 430 F.2d 365, 367 (9th Cir.1970) (noting that the arrest of the plaintiff by federal postal agents would have been justified under California Penal Code § 837, even if the agents lacked authority under a federal statute); *People v. Crusilla*, 77 Cal.App.4th 141, 91 Cal.Rptr.2d 415, 421 (1999) (holding that a federal immigration inspector's arrest of defendant was authorized as a citizen arrest).

Reliance on the California law of citizen arrest is misplaced in this context. Although the FTCA holds the United States liable in the same way that a private person would be liable "under like circumstances," 28 U.S.C. § 2674, the law enforcement obligations and privileges of the DEA agents "make the law of citizen arrests an inappropriate instrument for determining FTCA liability." *Arnsberg v. United States*, 757 F.2d 971, 979 (9th Cir.1985); *see also 21* U.S.C. § 878(a)(2); *Ting v. United States*, 927 F.2d 1504, 1514 (9th Cir.1991) (citing *Arnsberg*). In *Arnsberg*, we declined to require Internal Revenue Service agents, who arrested the plaintiff with a defective warrant, to meet the stricter standard for citizen arrests under Oregon law. 757 F.2d at 978-79. Instead, we concluded, "[t]he proper source for determining the government's liability" is "the law governing arrests pursuant to warrants." *Id.* at 979. Applying that law, we determined that the agents acted properly. *Id.*

The principle adopted in *Arnsberg* works both ways: just as the law of citizen arrest cannot be used to limit the authority of law enforcement officers, nor can it be used to

[44] California Penal Code § 837 permits a private citizen to arrest a person "[w]hen a felony has been in fact committed, and he has a reasonable cause for believing the person arrested to have committed it."

extend that authority, by proxy, beyond its territorial limits.[45] The DEA agents, not the Mexican nationals, identified Alvarez and planned the operation in detail; Alvarez's abductors acted merely as pawns. In this situation, the law of citizen arrest simply does not apply.

Although, as in *Arnsberg*, we apply the law governing arrests pursuant to warrants, we see a world of difference between the acts of the law enforcement officers in *Arnsberg* and the DEA agents who planned Alvarez's abduction. In *Arnsberg*, the IRS officials acted "nearly perfectly," consulting with the United States Attorney and arresting the plaintiff pursuant to a warrant with only a minor discrepancy. *Arnsberg*, 757 F.2d at 979. In contrast, as we have discussed, the DEA agents here had no authority, statutory or otherwise, to effect an extraterritorial arrest. Nor did their minions across the border, who could no more claim a lawful privilege to arrest Alvarez than could the DEA agents themselves under the same circumstances. The district court that issued Alvarez's arrest warrant had no jurisdiction to issue a warrant for an arrest in Mexico. *See* Fed.R.Crim.P. 4(c)(2). Accordingly, the DEA agents authorized a false arrest against Alvarez. We reverse the district court's dismissal of the FTCA claims and remand for further proceedings.

[45] The district court noted that Cal.Penal Code § 837 probably permits non-Californians to make a citizen arrest in California. California courts have applied this provision to police officers who make arrests outside of their jurisdiction but within California. *See, e.g., People v. Monson*, 28 Cal.App.3d 935, 105 Cal.Rptr. 92, 95 (1972). California law also permits Mexican police crossing the border in fresh pursuit of a suspect to make an arrest in California, provided that the official brings the prisoner before a magistrate in the county where the arrest occurred. *See* Cal.Penal Code § 852.2. However, these provisions do not authorize a planned, trans-border abduction of an alien by either law enforcement authorities or private citizens.

CONCLUSION

In summary, we affirm the judgment with respect to Sosa's liability under the ATCA, albeit on different grounds than the district court. We also affirm the substitution of the United States for the DEA agents, the choice of United States rather than Mexican law to determine damages, and the limitation of damages to Alvarez's time in captivity in Mexico. We reverse and remand the district court's dismissal of the FTCA claims against the United States. We approve the dismissal of Garate. Each party shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FISHER, Circuit Judge, with whom Chief Judge SCHROEDER and Circuit Judges GOODWIN, THOMAS, and PAEZ join, concurring:

I fully concur in the majority opinion, but write separately to articulate another ground on which I base my conclusion that Alvarez's arrest and detention were arbitrary because they were conducted without lawful authority. As the majority opinion explains, whatever power the political branches might have to override the principle of territorial sovereignty, Congress has not expressed its intent to delegate that power to the Drug Enforcement Agency. I would add, moreover, that to the extent the Executive branch has the power to act without congressional sanction, there has been no showing that that power was properly invoked here.

It may well be, as the majority and the dissenting opinions assume, that the Executive—like Congress—has the authority to breach another nation's sovereignty and override other norms of international law, should the need arise. It is evident, however, that neither Congress nor the Executive has expressed an intent to allow sub-Cabinet-level law enforcement officials in the DEA to be the final arbiters of that authority. The President, the Attorney General, the Secretary of State, perhaps the Secretary of Defense, the National Security Advisor—these are the proper Executive branch officials with whom to entrust the weighty decision to kidnap and arrest a suspect on friendly foreign soil. As Judge Gould acknowledges in his dissent, "the capture of a foreign national on foreign soil is no ordinary law enforcement choice; rather, it is a serious foreign policy decision," as evidenced by the international outcry that occurred in the wake of Alvarez's abduction. Such a decision, involving political judgments and national risks of the highest order, is-with all due respect to those involved—well above the paygrade of those who approved the abduction of Alvarez here.

DEA Agent Hector Berrellez made the offer to pay Mexican nationals to apprehend Alvarez in Mexico and deliver him to the United States. Berrellez received authorization to make this offer from his superiors in the Los Angeles office of the DEA and from DEA Deputy Administrator Pete Gruden in Washington, D.C. There is no evidence that anyone ranking higher than the DEA Deputy Administrator or the United States Attorney for the Central District of California explicitly approved the operation.[1]

It seems obvious that such a controversial, risky operation should have been evaluated and approved by the Attorney General personally (or at least by some high-ranking

[1] There are some indications that individuals in the Attorney General's office were informed of the plan. At an evidentiary hearing before the district court on Alvarez's motion to dismiss the indictment in his criminal case, Berrellez testified that he believed that the Attorney General's office had been "consulted" about the operation. *See United States v. Caro-Quintero*, 745 F.Supp. 599, 603 (C.D.Cal.1990). Berrellez did not, however, explain the basis for this belief; nor did he claim that the Attorney General's office gave its approval for the operation upon consulting with the DEA.

The only other evidence suggesting that the Attorney General's office might have been informed of the operation is an anonymous memorandum entitled "Operation Leyenda: Chronology" that the United States produced during discovery. According to the memorandum, whose origin is unclear, the United States Attorney's Office in Los Angeles approved the kidnapping plan, the DEA Administrator was "advised of the general plan, and he in turn advise[d] the Executive Assistant to the Attorney General." However, DEA Administrator John C. Lawn testified at his deposition that he had no advance knowledge of the plan to use Mexican nationals to apprehend Alvarez, and the United States denied Alvarez's request for admission that Lawn approved the operation. The assertions contained in Berrellez's testimony and in the memorandum are therefore unsupported by the evidence. Even if we were to accept the assertions as true, however, they indicate nothing more than that the Attorney General's office had knowledge of the operation. They do not support the further conclusion that the Attorney General explicitly sanctioned Alvarez's extraterritorial abduction.

Department of Justice official authorized to act on the Attorney General's behalf), probably in consultation with the Department of State or the White House Counsel's office. Indeed, Judge Gould's dissent is predicated on the notion that "extraordinary renditions" of suspects from foreign nations are such critical foreign policy decisions that they must be planned and coordinated at the highest levels of government. He would rob this notion of any force, however, by equating the DEA actors here with the upper echelon of the Executive branch.

The *Chen* case illustrates that the decision to engage in extraterritorial operations is beyond the discretion of law enforcement officers. In stark contrast to the abduction of Alvarez, the limited INS operation at issue in *Chen-as* the *Chen* opinion took pains to delineate-was carefully planned and subjected to high-level review and approval at various levels within the Department of Justice:

> On August 21, 1991, the Undercover Operations Review Committee of the United States Department of Justice (Review Committee) authorized the INS agents to proceed with the proposed undercover operation involving the use of the Corinthian in international waters.
>
> . . . .
>
> On August 27, the Review Committee considered a revised plan for the INS's proposed undercover operation. . . . The Review Committee was aware that INS agents would conduct the undercover investigation in international waters when approval was given. The Review Committee guidelines specifically contemplate an INS "undercover operation [that] will be conducted substantially outside the United States." INS Undercover Operation Guidelines at IV.A.(2). The operation was also approved by the United States Attorney for the Central District of California and an Assistant Attorney

> General in the Department of Justice, both of whom knew that the operation would be conducted in international waters.

Chen, 2 F.3d at 332. As we were careful to point out, the INS agents did not act on their own discretion but instead sought approval from numerous Department of Justice officials, "all of whom answer directly to the Attorney General herself." *Id.* at 334.

The logic of the conclusion that federal law enforcement officers must obtain Cabinet-level authorization for making extraterritorial arrests finds persuasive expression, in fact, in a legal opinion issued by the Department of Justice's own Office of Legal Counsel ("OLC"), legal advisor to the Attorney General and to the Executive branch generally. In 1989, Assistant Attorney General William P. Barr addressed the very questions we confront here, but in the context of the FBI's authority "to investigate and arrest individuals for violating United States law, even if the FBI's actions contravene customary international law." 13 U.S. Op. Off. Legal Counsel 163 (1989) ("Barr Opinion"). The Barr Opinion contended—contrary to a previous 1980 OLC Opinion—that the FBI had such authority, either statutorily or at least through the Attorney General. Whatever weight the Barr Opinion merits, it did not endorse the FBI's ability to act on its own authority, but rather cautioned that the FBI may violate international law only "at the direction of the President or the Attorney General." *Id.* at 183. Indeed, the Opinion was even more explicit, and cautionary, in its advice regarding the extent and exercise of authority "to override customary international law" in, for example, forcibly abducting a suspect from another country without that country's consent. *Id.* at 180-81. The Barr Opinion advised in a prescient passage that:

> [W]e believe that the Attorney General has the power to authorize departures from customary or other international law in the course of law enforcement activities and that the President need not personally approve such actions. *We would not recommend, however, that the Attorney General delegate the authority to more subordinate officials.* Even if he is viewed as exercising statutory authority . . . we think that as a prudential matter the Attorney General should, in this case, exercise it personally. Decisions such as *Garcia-Mir [v. Meese*, 788 F.2d 1446 (11th Cir.1986)] rely on the theory that the Executive has the constitutional authority to make political decisions affecting our international relations. To the extent that such decisions are made by officials below cabinet rank, however, the factual basis for this theory may be weaker.
>
> *Specifically, we recommend that any overseas law enforcement activity that presents a significant possibility of departing from customary or other international law be approved directly by the President or the Attorney General.*

Id. at 180 (emphasis added).

Judge O'Scannlain's dissent therefore misses the mark by repeatedly stating that Congress has delegated to the Attorney General the authority to determine whether to enforce our laws extraterritorially. Even if such a delegation has in fact occurred—which has not been demonstrated here—it would be of little import in this case, because there is no evidence that the Attorney General played a role in the decision to abduct Alvarez.

Given the absence of specific approval by the Attorney General or any other Cabinet-level official, Judge O'Scannlain argues that the DEA enjoys the more general statutory authority to make extraterritorial arrests on its own accord. In support of this contention, he relies on *Chen*, claiming that the DEA's authority to act extraterritorially is the same as that

of the INS. The critical distinction, however, is that the Attorney General has explicitly delegated to the INS his broad powers to enforce the immigration laws.[2] *See* 8 C.F.R. § 2.1. In the case of the DEA, the Attorney General has made no such delegation.

Judge O'Scannlain's dissent urges that this lack of an explicit delegation does not matter because Congress has authorized the extraterritorial *application* of the criminal statutes for which Alvarez was charged, and this authorization "would seemingly sanction" the extraterritorial *enforcement* of those statutes. The extraterritorial application and the extraterritorial enforcement of criminal statutes are far from synonymous concepts, however. That Congress may have intended a criminal statute to reach conduct that occurs beyond our borders, and that United States courts would have jurisdiction over such crimes, does not mean that Congress also intended to give law enforcement officers unlimited authority to enforce the statute by entering a foreign nation, uninvited, to abduct a foreign national, in violation of international law. Indeed, that is why we enter into extradition treaties. It is therefore not enough to say, as Judge O'Scannlain contends, that "Congress must have intended to have the laws enforced [extraterritorially] by some member of the Executive branch," for even if Congress did so intend, I cannot conclude that Congress silently designated the DEA officials, rather than the Attorney General, as the Executive branch officials to whom it was entrusting the decision to engage in extraterritorial law enforcement.

In the wake of the brutal murder of DEA Agent Camarena, the Drug Enforcement Administration understandably wanted to capture and punish those who were responsible for the

[2] Moreover, as I explained earlier, the INS agents who planned the operation in *Chen* sought high-level approval from the Department of Justice despite this general delegation of the Attorney General's authority.

death of one of its own. But in the absence of congressional delegation of the authority to override another nation's territorial sovereignty-an absence that the majority opinion has amply demonstrated-the decision to sneak into a friendly nation and abduct one of it citizens, in violation of international law, was not for the DEA to make. That decision belonged to the Attorney General and other members of the Cabinet, if not to the President himself. Because the highest levels of the Executive branch played no role in planning or authorizing Alvarez's abduction, and because Congress has not granted the DEA the more general authority to conduct extraterritorial law enforcement activities, I agree that the arrest and detention of Alvarez were arbitrary because they were not "pursuant to law." Alvarez therefore has established a violation of the law of nations that is actionable under the ATCA.

O'SCANNLAIN, Circuit Judge, with whom Circuit Judges RYMER, KLEINFELD, and TALLMAN join, dissenting:

We are now in the midst of a global war on terrorism, a mission that our political branches have deemed necessary to conduct throughout the world, sometimes with tepid or even non-existent cooperation from foreign nations. With this context in mind, our court today commands that a foreign-national criminal who was apprehended abroad pursuant to a legally valid indictment is entitled to sue our government for money damages. In so doing, and despite its protestations to the contrary, the majority has left the door open for the objects of our international war on terrorism to do the same.[1]

[1] Perhaps cognizant that its analysis cannot bear its own weight if applied more broadly, the majority recites that we need not worry because its holding "is a limited one." *Supra* at 608. Count me, however, among those unassuaged by the majority's assurances. I believe that impermissibly encroaching upon the duties rightfully reserved to the political branches is of serious consequence, and unfortunately such encroachment establishes a very troubling precedent which we will regret. Indeed, the majority's attempt to distinguish the circumstances of this case from other overseas operations conducted by our nation's military and law enforcement personnel may not prove to be so facile. One of the many vexing questions implicated by its opinion, but left unanswered by the majority, is what are we to make of sub-agencies within the Department of Homeland Security, as well as the Federal Bureau of Investigation ("FBI"), the Drug Enforcement Administration ("DEA"), the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), and other law enforcement agents who aid and assist in the war against terrorism and efforts to protect homeland security by capturing known terrorists and criminals in foreign locales across the globe? Unless the majority believes that every use of transborder arrest by the Executive branch falls within "its power to detain under the war powers of Article II," *supra* at 609 (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir.2003))-which is obviously not the case-no rational observer can honestly say that our court's holding today "is a limited one."

What makes this astounding pronouncement even more perverse is that our court divines the entitlement to recovery from the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, a statute first enacted over 200 years ago by members of the First Congress, many of whom were Framers of our nation's Constitution. With utmost respect to the majority, there is simply no basis in our nation's law for this bewildering result, and the implications for our national security are so ominous that I must dissent.

I

Notwithstanding the majority's lengthy disquisitions concerning various theories and sources of international law, the central issue in this case is very simple: Do American law enforcement agents violate well-established principles of American jurisprudence when they apprehend a duly-indicted suspect outside the confines of our nation's borders?[2] The answer is clearly no; the United States has neither now nor ever agreed to an asserted international law principle prohibiting the practice of transborder abduction.[3]

[2] As an initial matter, I am sympathetic with many of the separation of powers concerns expressed in Judge Gould's separate dissent. Indeed, I share a similar apprehension that the majority's approach could have dire consequences if applied to our nation's current military and law enforcement operations overseas.

However, interestingly enough, the government, neither in its brief on cross-appeal nor its amicus brief, argued for the applicability of the political question doctrine. In any event, under our precedent, I believe that Alvarez, while not entitled to relief, has stated a justiciable claim under the ATCA.

[3] I agree with the majority that Alvarez lacks standing to obtain redress under the ATCA for Sosa's and the DEA agents' alleged infraction against Mexican sovereignty; state-on-state injuries like the one Alvarez alleges here are singularly inappropriate for assertion of third-party rights by foreign citizens.

Moreover, I agree with the majority that Alvarez's claim for transborder abduction must fail. However, because the majority reaches this

The majority, perhaps overlooking the grandeur of the forest while gazing with much admiration at the trees, meanders through various sources which suggest how pleasant it would be if transborder abduction were actionable. However, the majority's searching inquiry into the scope of international law is simply unnecessary. The ATCA is a congressionally enacted statute; accordingly, international law in this context must first and foremost comport with American case law and congressional intent, rather than be defined by the amorphous expressions of other countries or international experts. In other words, no claim can be actionable under the ATCA based on a norm to which the United States itself does not subscribe.

I do not suggest that the majority's inquiry into the status of transborder arrest in the broader international commu nity—which Congress, by enacting the ATCA, has directed us to perform in appropriate cases—is one beyond the federal courts' ability to undertake. Indeed, some areas of substantial international unanimity are easily recognized. *See, e.g., Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig) ("Marcos I)*, 978 F.2d 493, 500 (9th Cir.1992). Nevertheless, I believe that in many cases, as in this one, it will be far easier to determine whether the United States subscribes to a given norm than whether other countries do, and accordingly the former inquiry should appropriately precede the latter.

II

I respectfully suggest that the majority has imprudently ignored the relevant underpinnings of the ATCA. As demonstrated below, a proper historical understanding of the ATCA compels the conclusion that no claim can prevail

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result in a rather circuitous manner, I write separately on this issue to underscore that the United States has neither acquiesced in, nor considers itself bound by, any supposed norm against transborder arrest.

where the United States, through its political branches, does not acquiesce in an international norm.

A

First enacted as part of the Judiciary Act of 1789, the ATCA still reads today almost exactly as the First Congress drafted it; the version currently enshrined in Title 28 provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1994); *see* Judiciary Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

The ATCA was, from the beginning, a curious provision. As one eminent scholar of both federal jurisdiction and American legal history notes, the ATCA was one of only two provisions of the Judiciary Act that "arguably g[a]ve federal courts jurisdiction over judicial matters outside the enumeration of Article III." David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, at 51-52 (1997).[4] Perhaps because of the singular nature of its jurisdictional grant, the ATCA was infrequently used for almost two hundred years, until fairly recently when courts have eagerly exploited the opportunity to revivify it.

In the course of this resurgence of a statutory provision that lay largely dormant since our nation's founding, our court has determined that certain international law principles may be incorporated into federal common law, and thereby into the ATCA as well. *See Hilao v. Estate of Marcos (In re Estate of*

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[4] The other was the Act's apparent provision for general alienage diversity jurisdiction, rather than jurisdiction only over controversies between aliens and U.S. states or citizens, as specified in Article III, Section 2. Currie, *supra*, at 51. The Supreme Court subsequently construed the statute's reference to suits "where an alien is a party" to comprehend only suits "between citizens and foreigners," to conform to the Article III grant. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14, 1 L.Ed. 720 (1800) (emphasis omitted).

Ferdinand Marcos, Human Rights Litig.) ("Marcos IF), 25 F.3d 1467, 1475 (9th Cir.1994). The *Marcos II* court set out the standard for evaluating whether an ATCA plaintiff states a claim: "Actionable violations of international law must be of a norm that is specific, universal, and obligatory." *Id; accord, e.g., Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir.2002); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-84 (9th Cir.1998).

B

The requirement of "universality" constitutes an insurmountable bar to recovery for transborder arrest.[5] I focus in particular on the corollary of this requirement: a norm of international law not recognized by the United States cannot be deemed a universal one, actionable in this nation's courts.

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[5] Of the elements required for an actionable norm under the ATCA, "specificity" is, appropriately, the clearest of the three. International law from the time of the ATCA's enactment has been somewhat inchoate, and as the number of international agreements, conventions, and organizations has grown, discerning the substance of the law of nations has required rather more than reading the works of Pufendorf, Burlmaqui, and Vattel with which members of the First Congress were presumably familiar. Moreover, the international community whose customs and practices define the law of nations has become larger and more diverse. It is not surprising, therefore, that frequently the propositions capable of attracting the broadest support are also the most diffuse (and thus the least likely to offend). Yet much diplomatic gloss, though possessing great virtue for its significance to the development of the law of nations in the broadest sense, provides no suitable basis for tort litigation.

A "specific" norm, therefore, is one sufficiently "'definable,'" *Marcos II*, 25 F.3d at 1475 (quoting with approval *Ford v. Suarez-Mason*, 672 F.Supp. 1531, 1539-40 (N.D.Cal.1987)), such that its violation can be objectively ascertained. To be sure, the nations of the world need not have commonly agreed upon an exhaustive catalogue of every variation, but the norm itself must have become "clear and unambiguous." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 819-20 (D.C.Cir.1984) (Bork, J., concurring) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980)) (internal quotation marks omitted).

We have previously noted the importance of determining whether a norm of international law is recognized by the United States. *See Martinez*, 141 F.3d at 1383 ("To determine whether this tort satisfies the requirement for a tort claim under the Alien Tort Act, we must decide '[1] whether there is an applicable norm of international law [proscribing such a tort] . . . *recognized by the United States* . . . and [2] whether [that tort] was violated in [this] particular case.'" (quoting *Marcos I*, 978 F.2d at 502 (alterations in original) (emphasis added))). *Marcos I* did not state this requirement explicitly, but the exposition of the constitutional basis for the ATCA, *see supra* at 612, makes clear that the *Martinez* court correctly recognized that ATCA jurisdiction subsumes it.

Federal common law is a means of preserving a uniform national construction of rights and obligations within a given area of the law even in the absence of a detailed statutory scheme. *See, e.g., Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981). This consideration carries particular force in the foreign policy context in which the ATCA lies; it was passed, let us remember, in 1789, only months after the First Congress convened. The Framers, and presumably those who went on to serve the new government, were acutely conscious of the need for the national government's interpretation of the law of nations to be controlling. *See, e.g., The Federalist No. 3*, at 43 (John Jay), *No. 80*, at 476-77, 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Yet one equally basic characteristic of federal common law is that Congress may supplant it as the rule of decision, because the power to legislate rests most properly with the elected representatives who possess both the greater competence and the greater authority, conferred by the people, to wield it. And the same is no less true with regard to the law of nations as federal common law; indeed, foreign policymaking is essentially confided not merely to the national government writ large,

but to its political branches in particular.[6] E.g., *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948); *Oe jen v. Cent. Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1918); *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).

The Framers and the First Congress viewed the United States's substantial adoption of the law of nations as furthering their intention that the new nation take its place among the civilized nations of the world. E.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474, 1 L.Ed. 440 (1793) (opinion of Jay, C.J.). Yet they clearly did not mean for the law of nations to act as an irrevocably binding constraint on the law and policy-making authority of the national government. In his last contribution as Publius, John Jay famously recognized the binding nature of treaties, and a number of the Framers shared his view that treaties created a binding obligation on the contracting parties under the law of nations. *The Federalist No. 64*, at 394 (John Jay); *see, e.g.*, Note, *Restructuring the Modern Treaty Power*, 114 Harv. L. Rev. 2478, 2484-90 (2001) (discussing the Framers' views). But the law of nations imposed constraints "in point of moral obligation," not restrictions on national policymakers' power to breach. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272, 1 L.Ed. 568 (1796) (opinion of Iredell, J.). The Framers intended that the United States would have the *power*, if not necessarily the *right* under the law of nations, to violate or even to repudiate aspects of the law of nations, provided it were willing to face

[6] Of course, accepting this principle still leaves open the question of how that responsibility should be allocated *between* the political branches. For present purposes, it is sufficient to say that whatever degree of responsibility the President enjoys vis-à-vis Congress, the political branches collectively enjoy primacy over the judiciary in the management of our foreign relations.

the consequences of its breach, possibly including war.[7] And it was for this reason that the power to violate or to repudiate, like the power over foreign affairs generally, was confided to the national government. *See The Federalist No. 80, supra*, at 476 ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."). The federal common law's incorporation of the law of nations, in short, is not beyond the political branches' power to alter. And this fact is entirely consonant with the principle, expressed in our cases as elsewhere, that "[c]ustomary international law, like international law defined by treaties and other international agreements, rests on the consent of states." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992); *see id.* ("A state that persistently objects to a norm of customary international law that other states accept is not

[7] *See, e.g.*, Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1568 (1984) ("[E]very State has the power-I do not say the legal right-to denounce or breach its treaties, or to violate obligations of customary international law." "[I]t is inconceivable that the Constitution intended to make it impossible or impermissible-unconstitutional-for the United States to violate a treaty or other international obligation."). One of the handful of cases sustaining ATCA jurisdiction, *Bolchos v. Darrel*, 3 F.Cas. 810 (D.S.C.1795) (No. 1,607), likewise recognizes the power to depart from the law of nations. *See id.* at 811 ("It is certain that the law of nations would adjudge neutral property, thus circumstanced, to be restored to its neutral owner; but the . . . treaty with France alters that law. . . ."). Although the law of nations did not favor the libelant, the *Bolchos* court found in his favor nonetheless because jurisdiction was proper under the ATCA's *treaty* provision and because the treaty in question conferred an enforceable right to sue. *See id.* Despite *Bolchos's* distasteful subject matter-the action was for recovery of a cargo of slaves-the opinion offers some insight into contemporaneous understanding of the law of nations as enforced by the ATCA.

bound by that norm . . . ." (citing Restatement (Third) of the Foreign Relations Law of the United States [hereinafter Restatement] § 102 cmt. d)).

Therefore, where the political branches have exercised their power to diverge from the course that others see the law of nations as setting, ATCA liability cannot lie. The ATCA's conformity with Article III rests on the incorporation of the law of nations as federal common law—particularly in a case like this one, where neither alienage, nor admiralty, nor any of the other headings of Article III provides a basis for federal jurisdiction. It is for this reason that an ATCA plaintiff relying on the law of nations (as opposed to a treaty) must allege a tort that violates some norm of international law recognized by the United States.

At least one of the few Supreme Court opinions to consider the ATCA directly appears to have recognized as much. In *O'Reilly De Camara v. Brooke*, 209 U.S. 45, 28 S.Ct. 439, 52 L.Ed. 676 (1908), Justice Holmes wrote for a unanimous Court in affirming the dismissal of an ATCA complaint that alleged the tortious destruction of a hereditary title during the Spanish-American War. *Id.* at 48-49, 28 S.Ct. 439. Although the Court did not directly decide whether the plaintiff had alleged a tort cognizable under the ATCA, *see id.* at 52-53, 28 S.Ct. 439, it did make the following comment on that question: "[W]e think it plain that where, as here, the jurisdiction of the case depends upon the establishment of a 'tort only in violation of the law of nations, or of a treaty of the United States,' it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress, and the treaty-making power all have adopted the act." *Id.* at 52, 28 S.Ct. 439.

Such analysis fits with our case law's incorporation of the requirement that an actionable norm of international law be "universal." The case at hand does not require us to delineate the bare minimum level of acceptance that would constitute

"universality"; instead, it invokes the simple proposition, stated explicitly in *Martinez* and implicitly in other cases, that in determining whether a norm is "universal," the United States is to be counted as a part of the universe. A norm to which the political branches of our government have refused to assent is not a universal norm. It is not the judiciary's place to enforce such a norm contrary to their will.[8]

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[8] The final requirement under our law is that an actionable norm be "obligatory." Our cases have used this term to mean "binding" rather than merely "hortatory." *Marcos II*, 25 F.3d at 1475 (quoting with approval *Forti*, 672 F.Supp. at 1539-40). Binding norms "confer [ ] fundamental rights upon all people vis-a-vis their own governments." *Id.* at 1475-76 (quoting *Filartiga*, 630 F.2d at 885) (alteration in original) (internal quotation marks omitted). Sosa and the DEA agents argue that the class of obligatory norms is further restricted to those that are obligatory in the literal sense, i, *e.*, those that nation-states *must* obey. In the parlance of international law, such a norm falls under the heading of *jus cogens*.

This argument is not without support in the case law. Courts applying *Marcos II's* tripartite standard have debated whether the only "obligatory" norms whose violation is actionable under the ATCA are those that have attained *jus cogens* status, and indeed, some have adopted the position that the defendants urge. *Compare, e.g., Nat'l Coalition Govt of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 345 (C.D.Cal.1997) ("[A] foreign sovereign's expropriation of its national's property does not constitute a jus cogens violation of the law of nations and, therefore, is not cognizable under § 1350."), *Xuncax v. Gramajo*, 886 F.Supp. 162, 184 (D.Mass. 1995) ("These qualifications essentially require that . . . the prohibition against [the act in question be] non-derogable and therefore binding at all times upon all actors."), *and Beanal v. Freeport-McMoRan Copper & Gold, Inc.*, 969 F.Supp. 362, 370 (E.D.La.1997) (citing *Xuncax*), *aff'd*, 197 F.3d 161 (5th Cir.1999), *with Doe v. Unocal Corp.*, 110 F.Supp.2d 1294, 1304 (C.D.Cal.2000) ("While the Ninth Circuit has not expressly held that only jus cogen *[sic]* norms are actionable, the Circuit's holding in *Estate II* that actionable violations are only those that are specific, universal, and obligatory is consistent with this interpretation."), *and In re World War II Era Japanese Forced Labor Litig.*, 164 F.Supp.2d 1160, 1179 (N.D.Cal.2001) ("It remains unclear, however, whether all jus cogens norms meet the 'specific, universal and obligatory standard' required to be actionable under section 1350."), *with Mehinovic v.*

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The majority fails to take into account these fundamental principles, which invoke the historical understanding in which the ATCA was passed and the proper role of the political branches in determining our nation's actions as they relate to national security. As a result, the majority's analysis of the status of transborder arrest as an instrument of law enforcement-which has great bearing on its treatment of Alvarez's alternative claim for relief for arbitrary arrest is seriously flawed because it ignores the baseline proposition that it is easier for this court to determine whether the United States agrees with a norm than to determine whether a preponderance of the world's other nations does.

Let us recall the particular circumstances of the case at hand. Alvarez was charged in 1990 with, among other offenses, the kidnaping[9] and felony murder of a federal agent in violation of 18 U.S.C. §§ 1114(1) and 1201(a)(5). *See, e.g., Alvarez-Machain II*, 504 U.S. at 657 n. 1, 112 S.Ct.

Vuckovic, 198 F.Supp.2d 1322, 1344 (N.D.Ga.2002) (*"A jus cogens* violation satisfies, but is not required, to meet [the 'specific, universal, and obligatory'] standard.").

However, we need not decide whether the term "obligatory" necessarily means that *a jus cogens* norm is required. Our prior cases have left this question open. And despite the majority's assertion to the contrary, this case does not require us to pronounce defmitively on the relevance of the distinction between *jus cogens* and mere customary international law. If Alvarez in fact alleges violations of *a jus cogens* norm, as did the plaintiffs in the Marcos litigation, or if he alleges violations of a derogable norm to which the United States does not subscribe, we may bypass the significance of *jus cogens* status. The distinction would be significant only if Alvarez alleges violations of a norm that is recognized by the United States-and therefore incorporated into the federal common lawbut lacks the universal acceptance within the international community that is the *sine qua non* of *a jus cogens* norm.

[9] A 1994 amendment added a second "p" to the term, which now lists the crime as "kidnapping."

2188. The kidnaping statute appears to contemplate the exercise of federal criminal jurisdiction over certain defendants who are neither Americans nor found in the United States. *See* 18 U.S.C. § 1201(e) (2000) (authorizing the exercise of jurisdiction over defendants if they are American nationals, if they are found in the United States, *or* "if the victim is a representative, officer, employee, or agent of the United States"). Notwithstanding the majority's assertions to the contrary, the general statutes governing the operation of the Drug Enforcement Administration confer on DEA agents the authority to "make arrests without warrant ... for any felony, cognizable under the laws of the United States, if [an agent] has probable cause to believe that the person to be arrested has committed or is committing a felony." 21 U.S.C. § 878(a)(3) (2000). DEA agents may also "perform such other law enforcement duties as the Attorney General may designate." *Id.* § 878(a)(5).

This statutory framework confers on the DEA agents the same degree of authority to act extraterritorially that we have previously held INS agents to possess. *See United States v. Chen*, 2 F.3d 330 (9th Cir.1993). In *Chen*, we considered whether the INS was authorized to conduct criminal law enforcement activity outside the United States. We held that "Congress need not confer such authority *explicitly* and *directly* on the INS agents themselves." *Id.* at 333. We inferred from Congress's broad grant of authority to the Attorney General to enforce the immigration laws,[10] and from the extraterritorial applicability of those laws, that the enforcement power extended where the laws themselves extended. *See id.* at 333-34.

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[10] She had in turn delegated that authority to the Commissioner of Immigration and Naturalization, who in turn delegated it to rank-and-file INS agents. *Chen*, 2 F.3d at 334 (citing 8 C.F.R. § 2.1 (1991)).

Faced with our holding in *Chen*, Alvarez argues, and the majority erroneously agrees, that the criminal context presented in this case is distinguishable from the unique context of border security at issue in *Chen*. Yet the statutes at issue here bear just as directly on national security, particularly insofar as they relate to and promote the federal government's ability to enforce the drug laws, and to protect the agents who carry out that enforcement, no matter on which side of the border they may be threatened. And so our cases have recognized. "Our circuit has repeatedly approved extraterritorial application of statutes that prohibit the importation and distribution of controlled substances in the United States because these activities implicate national security interests and create a detrimental effect in the United States." *United States v. Vasquez-Velasco*, 15 F.3d 833, 841 (9th Cir.1994). As we stated in another prosecution arising from the Camarena abduction and murder: "We have no doubt that whether the kidnapping and murder of [DEA] agents constitutes an offense against the United States is *not* dependent upon the locus of the act. We think it clear that Congress intended to apply statutes proscribing the kidnapping and murder of DEA agents extraterritorially." *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir.1991).

Applying the reasoning of *Chen* to the statutes that protect American drug enforcement personnel leads to the inescapable conclusion that Congress has authorized federal agents enforcing those statutes to make warrantless arrests beyond our borders-a conclusion at odds with the argument that the United States respects a norm prohibiting transborder arrests.

Moreover, such a norm, which would render a transborder arrest violative of the law of nations absent the host country's consent, does not seem tenable either as a matter of statutory construction or as a reflection of Congress' likely goal. I can conceive of a number of situations in which the nature of the

host country's government, or even the utter nonexistence of a functioning government, *precludes* obtaining the formal sanction of the local judiciary or of the host country. Indeed, in the months since September 11, 2001, the United States government has retrieved a number of individuals from lawless locales of this sort. *See, e.g., Al Odah v. United States*, 321 F.3d 1134 (D.C.Cir.2003). Therefore, the statutory authorization to make arrests overseas for violations of extraterritorially applicable law runs contrary to an alleged prohibition on transborder arrests.

It is true that in a number of other cases dealing with transborder arrests, the nation in which the arrest occurred did not object, even if it did not cooperate. While Mexico, by contrast, clearly and consistently protested Alvarez's seizure, it does not follow that the United States was obliged to comply with the processes of Mexico's judicial system.

One highly visible abduction, that like the case at hand also involved the extraterritorial enforcement of our nation's drug laws, refutes the notion that the United States has somehow divested itself of the authority to engage in transborder arrest without the consent of the host country. *United States v. Noriega*, 117 F.3d 1206 (11th Cir.1997), of course, dealt with the arrest of Panama's former strongman on drug-related charges. *Id.* at 1209-10.[11] Noriega was functioning "as the

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[11] For purposes of further illustration, I refer to the recent case of *Kasi v. Angelone*, 300 F.3d 487 (4th Cir.2002). Mir Aimal Kasi on the morning of January 25, 1993, stopped his automobile behind a line of automobiles outside of CIA headquarters in Fairfax County, Virginia, emerged from his vehicle, and opened fire on the other drivers with an AK-47 assault rifle. Two CIA employees were killed, and three other employees were wounded. Kasi fled to his home country of Pakistan the day after the shootings in order to avoid arrest. On February 16, 1993, Kasi was indicted for the various crimes that he had committed. For the next four and one-half years, Kasi remained at-large, traveling in Afghanistan and returning to Pakistan only for brief visits. Then, on June 15, 1997, FBI agents located and abducted Kasi from a hotel in

de facto, if not the *de jure*, leader of Panama" when the American military incursion to seize him occurred. *Id.* at 1211. Surely any protest from a Panamanian government controlled by Noriega himself could be disregarded, could it not, particularly if, as a matter of law, Noriega had forfeited his head-of-state immunity? *See id.* at 1212. Moreover—and herein lies the rub-the United States had consistently refused to acknowledge the legitimacy of Noriega's rule from its inception, which was after his indictment but well before the effort to retrieve him was ordered. *Id.* at 1209-10.

Therefore, irrespective of what various international law scholars and others may deem as advisable policy, these ruminations are of little consequence under the ATCA when the political branches of the United States have firmly decided on a course of action. Examining the relevant statutes, the actions of the political branches in other circumstances, and as discussed by the majority, the manner in which the President and the Senate have exercised the treaty power in this area, *see supra* at 618-619, leads to only one conclusion: The United States does not, as a matter of law, consider itself forbidden by the law of nations to engage

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Pakistan. Two days later, Kasi was transported back to Fairfax Country, Virginia and handed over to state authorities for prosecution. Kasi was eventually convicted and sentenced to death for his crimes. In response, therefore, to the majority's assertion that not "every executive branch decision to breach an international norm translates into a more global repudiation of that norm," *supra* at 620 n. *15*, *Kasi*, *Noriega*, and *Chen*, as well as the recent capture of terrorists all across the globe, *see, e.g.*, *Al Odah v. United States*, 321 F.3d 1134 (D.C.Cir.2003), are merely a few examples that demonstrate the consistent refusal of the political branches of this nation's government to adhere to a prohibition against transborder arrests. Consequently, the ATCA should provide no monetary relief to those criminals and terrorists captured pursuant to this valid tool of national security.

in extraterritorial arrest, but reserves the right to use this practice when necessary to enforce its criminal laws.[12]

III

If the majority had merely denied Alvarez's claims based on its exposition of international mores, I would be troubled by its failure to engage in a review of both the history behind

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[12] Because the prohibition on transborder arrest is not accepted by the United States and thus is not actionable under the ATCA, it is unnecessary to consider whether, as Sosa and the DEA agents urge, it is not actionable for the additional reason that it does not rise to the level *of jus cogens*.

However, it should be noted that no court, convention, declaration, or authority such as the Restatement has identified transborder abduction as a *jus cogens* norm. Rather *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), *Alvarez-Machain II*, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992), and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) indicate the opposite. *See United States v. Matta-Ballesteros*, *71* F.3d 754, 763 n. 5 (9th Cir.1995) (kidnaping does not violate recognized constitutional or statutory provisions in light *of Alvarez-Machain II*, and also does not qualify as *a jus cogens* norm such that its commission would be justiciable in our courts even absent a domestic law). Indeed, on remand in this case, we made it clear that there was no due process violation-put differently, that kidnaping isn't shocking-because it cannot be so fundamental as to constitute *a jus cogens* norm. *Alvarez-Machain III*, 107 F.3d 696, 702 (9th Cir.1997).

The Restatement, for example, has identified only torture, genocide, slavery, murder, prolonged arbitrary detention, and systematic racial discrimination. Neither do the conventions and declarations upon which Alvarez relies establish universal acceptance. The International Covenant on Civil and Political Rights was signed and ratified in 1992 but with the understanding by the Senate and Executive Branch that Articles 9 and 10 are not self-executing and may not be relied on by individuals; the American Convention on Human Rights has not been ratified; the Universal Declaration *of* Human Rights and the American Declaration *of* the Rights and Duties *of* Man are not binding legal obligations. None prohibits forcible abduction. Nor does it suffice to rely on general principles such as "rights to freedom *of* movement, to remain in one's country, and security in one's person."

the ATCA and the manner in which the political branches have exercised the option of transborder arrest in varied circumstances. But at least I would feel secure that we as judges had not improperly encroached upon the duties reserved for the political branches in formulating our nation's foreign policy. Most regrettably, by providing relief to Alvarez on his claim of prolonged arbitrary arrest, our court has in effect restricted the authority of our political branches, and it has done so in a way that finds no basis in our law.

A

The parties do not dispute that the prohibition on prolonged arbitrary detention is actionable under the ATCA. *See Martinez*, 141 F.3d at 1383-84. Nevertheless, the question remains whether the prohibition was violated in this case.

B

Notwithstanding its express recognition that the criminal statutes covering kidnaping, felony murder, and the other crimes involved in this case extend to conduct outside of the borders of the United States, the majority deems the government's action as "arbitrary."

The majority, although not expressly stating it as such, seems most troubled by the lack of Mexican authority for Alvarez's arrest. Indeed, imagine that the DEA had communicated with the Mexican government prior to seizing Alvarez and that such dialogue led to Mexican authorities assisting in the arrest, or acknowledging consent to the DEA's actions in some other manner. Under the majority's proffered approach the United States would be forced to compensate an alleged foreign-national criminal for "arbitrary arrest" within the meaning of the law of nations merely because the "wrong" Executive agency spearheaded the operation.

If Mexico had indeed sanctioned its actions, our court would not be subjecting the DEA to liability for successfully

negotiating via diplomatic means the capture of a wanted criminal. Or would it? This simple hypothetical, however, underscores the fallacy of the majority's approach. Whether the United States procured an arrest warrant through the Mexican judiciary should not affect our analysis, because the availability of local process is extremely sensitive, bound up with important foreign policy considerations that are confided to the political branches in general and to the Executive in particular. Indeed, the majority elsewhere recognizes that "an individual's right to be free from transborder abductions has not reached a status of international accord sufficiently to render it 'obligatory' or 'universal,' [and therefore] cannot qualify as an actionable norm under the ATCA." *Supra* at 620.

Nevertheless, seemingly under the majority's approach, such extraterritorial arrest authority may still be subject to a requirement that any agents exercising it on foreign soil—s opposed to the high seas, as was the case in *Chen*, 2 F.3d at 332—btain the consent or assistance of the host country. The majority, in a rare moment of restraint, does recognize the "powers of the political branches to override the principles of sovereignty in *some* circumstances, should the need arise." *Supra* at 629 (emphasis added). However, the "need" to engage in transborder arrest without the prior consent of a foreign nation should appropriately be left to the discretion of the political branches.

Indeed, the federal courts are not charged with determining the legitimacy of another nation's government. Yet this is essentially what the majority would have us do. Under its approach, the United States would have departed from the ostensibly black-and-white approach that sanctions transborder arrests when employed by our nation's political branches. In its place, a decision to make a transborder arrest would only be permissible when the host country's system of government absolutely requires it, as determined by this

country's courts through the medium of ATCA litigation. As judges, we would have to determine whether a nation's courts are open and functioning; whether it has a legitimate government that can be consulted for permission to seize a suspect; if there are multiple contenders, *see, e.g., Noriega*, 117 F.3d at 1209-10, to which one such a request must be addressed; and so on. Courts are quite unsuited to undertake such analyses, and, indeed, to do so would bring us perilously close to trenching on the power of diplomatic recognition that Article II, Section 3 places at the core of the Executive's foreign affairs authority. *See, e.g., Guaranty Trust Co. v. United States*, 304 U.S. 126, 137-38, 58 S.Ct. 785, 82 L.Ed. 1224 (1938); *Oe jen*, 246 U.S. at 302-03, 38 S.Ct. 309.

I am simply not prepared to declare that Congress intended that any alien charged with a crime, under extraterritorially applicable U.S. criminal law, could remain in a country that refuses extradition. Congress has authorized the arrest, without warrant, of aliens for whom there is probable cause to suspect violation of an extraterritorially applicable statute. In so doing, Congress has left to the Executive, which already possesses the general responsibility for deciding both when and whether to arrest and to prosecute and how best to conduct the nation's foreign relations, the burden of determining when the national interest requires bypassing diplomatic channels to secure such arrest. As the Supreme Court has held in another context, "Situations threatening to important American interests may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275, 110 S.Ct. 1056, 108 L.Ed.2d 222(1990).

C

Turning now to its proffered reason for granting Alvarez redress under the ATCA, the majority claims there was "no basis [under United States] law for the DEA's actions." *Supra* at 631.

1

The majority reaches this extraordinary result even though it concedes that the United States has reserved for itself the authority to arrest criminals and terrorists abroad as a valid law enforcement technique, and that Congress has explicitly extended the reach of criminal statutes for which Alvarez was charged to apply to conduct outside of the nation's borders. Even more astonishing is that the majority bases its holding on the premise that the DEA's actions were "arbitrary" within the meaning of the law of nations because they were beyond the scope of authority conferred by Congress.

In this case, Alvarez was arrested pursuant to an American warrant, issued following his indictment by a federal grand jury on felony charges. He was held overnight and then brought to the United States, where he was promptly placed in federal custody and was arraigned as soon as his medical condition permitted. The majority fails to explain adequately how an arrest supported by probable cause and ordered by a warrant, leading to a brief period of confinement before transfer to custody on American soil with all its attendant legal process, rises to the level of arbitrary detention merely because a parallel warrant was not obtained from the harboring state.

This view does not necessarily render such a seizure legal in every respect; we are limited here to the question whether the arrestee can recover in tort under the Alien Tort Claims

Act, which presupposes a violation of the law of nations.[13] Whatever false arrest claim Alvarez might have, he has not stated a violation of the law of nations to which we adhere.

2

In any event, contrary to the majority's surmise, the DEA was well within its delegated powers when arresting Alvarez. The relevant statutory provisions confer on DEA agents the authority to "make arrests . . . *for any felony*, cognizable under the laws of United States" and the added authority to "perform such other law enforcement duties as the Attorney General may designate." 21 U.S.C. § 878(a) (emphasis added). Because it is undisputed that Congress has authorized the extraterritorial application of the criminal statutes for which Alvarez was charged, *see supra* at 624, this broad legislative delegation of enforcement powers to the DEA would seemingly sanction the extraterritorial arrests at issue in this case.

Nevertheless the majority would narrow this broad delegation of enforcement power and restrict the DEA's authority to engage in transborder arrests because it concludes that it would be "anomalous" for Congress to confer a similar degree of authority to "any State or local law enforcement

[13] It is important to note that Alvarez did bring a number of other claims which, if proven, might well have been cognizable-under the ATCA or otherwise. He alleged that he suffered cruel and degrading reatment, that he was subjected to assault and battery, that his captors had intentionally inflicted emotional distress. The district court took several of these claims to trial and resolved each of them in Sosa's favor, finding that Alvarez was not credible. The only ATCA claims that survived for appeal were those relating to the undisputed fact of Alvarez's seizure, not his allegations of abuse, torture, or mistreatment. But in the appeal before us, it is clear that the mere fact of a transborder arrest without the host country's consent is not actionable under the ATCA, absent a substantiated claim of mistreatment that independently violates aspects of the law of nations that the United States recognizes.

officer designated by the Attorney General." *Supra* at 626-627. However, there is nothing "anomalous" about the legislative branch delegating to the Attorney General to determine in his best judgment whether non-federal law enforcement agents can aid in the application and enforcement of this nation's criminal laws extraterritorially. Instead, Congress engaged in such a broad delegation of law enforcement authority to the DEA and to the Attorney General in order to allow the Executive branch to have the widest array of enforcement options at its disposal.

In addition to the clear language of 21 U.S.C. § 878(a), this court's statutory interpretation is guided by the Supreme Court's recognition that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Furthermore, "[d]elegation of foreign affairs authority is given even broader deference than in the domestic area." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438 (9th Cir.1996). "Congress-in giving the Executive authority over matters of foreign affairs-must of necessity paint with a brush broader than it customarily wields in domestic areas." *Id.* (quoting *Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965)).

Nevertheless, the majority claims there is an utter void of authority for the DEA's actions. The majority is undeterred by the fact that Congress has authorized the extraterritorial application of the criminal statutes involved in this case and has delegated broad powers of enforcement to the DEA "for any felony, cognizable under the laws of the United States." The majority's holding flies in the face of the clear statutory language enacted by Congress as well as the principle of statutory construction that delegations to the Executive branch are entitled to greater judicial deference in matters involving politically sensitive foreign affairs.

Furthermore the majority's approach leads unavoidably to the following question: if Congress through enactment of 21 U.S.C. § 878(a) has not in fact authorized the DEA and Attorney General to enforce extraterritorially the criminal laws for which Alvarez was charged, to whom exactly has Congress delegated this enforcement authority? By extending the reach of our criminal laws to apply to conduct outside of the nation's borders, Congress must have intended to have the laws enforced by some member of the Executive branch.[14]

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[14] In a separate concurrence, Judge Fisher seemingly concedes that Congress has authorized the Executive branch to engage in extraterritorial law enforcement activities, but nonetheless divines that such decisions have to be made by the "President, the Attorney General, the Secretary of State, perhaps the Secretary of Defense, the National Security Advisor." *Supra* at 642 (Fisher, J., concurring). However, in matters of foreign affairs, nation-states are often intentionally guarded as to precisely which government officials authorize and possess knowledge of covert operations. Furthermore, regardless of whether it is desirable public policy to require high-ranking officials to admit their participation in complex international operations in order to shield the United States and its "sub-Cabinet-level enforcement officials" from liability under the ATCA, there is simply no basis in the Constitution, existing statutes, or our case law for such a legal conclusion.

Judge Fisher tries to find support for his position from a 1989 advisory opinion issued by an attorney in the Department of Justice's Office of Legal Counsel. This advisory opinion expressly recognized the authority of the Attorney General to depart from the norms of international law in the course of law enforcement activities, even without the approval of the President. The opinion then "recommend[s], however, that the Attorney General [not] delegate the authority to more subordinate officials." *Supra* at 642 (Fisher, J., concurring).

As a matter of public policy, this advisory opinion may be of interest to show how the Executive branch might exercise the discretion conferred to it by Congress to engage in extraterritorial law enforcement activities. But such an advisory opinion, of course, neither constitutes binding law nor justifies the newly minted judicial constraints proposed by Judge Fisher to be imposed upon the Executive branch for conducting foreign affairs.

Under the majority's approach, this nation would be left to the whims of foreign countries in enforcing its laws because Congress, in delegating broad law enforcement powers to the Executive branch, did not redundantly recite that extraterritorial enforcement is to be included.[15]

3

Both the statutory structure and our own precedent indicate that the criminal provisions in question apply extraterritorially. Correspondingly, the statutes and precedent also indicate that Congress has authorized their extraterritorial enforcement. Under such circumstances, we are not free to conclude that the political branches have bound themselves—or, to be more precise, have bound the Executive—to the mast. And the prospect of international opprobrium is not sufficient for us as judges to impose a constraint the political branches have not.[16]

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[15] While today's holding may seem innocuous with regard to Mexico, "an important ally and trading partner," the current war on terror in Afghanistan and in other countries, *Kasi*, and *Noriega* are but a few examples that illustrate that such an approach would unduly interfere with the Executive branch's ability to carry out its prescribed duties regarding law enforcement and national security.

[16] The majority also concludes, as to Alvarez's Federal Tort Claims Act ("FTCA") claims, that the DEA agents authorized a false arrest against Alvarez. That Congress intended several of the federal statutes that Alvarez was charged with violating to be both applicable and enforceable beyond the borders of the United States, effectively begins and ends this inquiry. The federal officers were authorized by statute to make warrantless arrests. And the provision in Rule 4(d)(2) of the Federal Rules of Criminal procedure that a "warrant may be executed . . . at any place within the jurisdiction of the United States"—a provision that, when adopted, was intended to *broaden* the territorial scope of a federal court's power to issue process, *see* Fed.R.Crim.P. 4 advisory committee's note—does not preclude federal authorities from obtaining an arrest outside the United States when Congress has authorized them to enforce an extraterritorially applicable statute beyond the national borders.

IV

Dr. Alvarez's capture and delivery to the United States may have offended the sensibilities of some members of our court. As a matter of public policy, such actions may even be worthy of the condemnation that certain pundits and foreign countries, as cited by the majority, have bestowed. But we are not asked in this case to condemn or to condone the federal government's actions; we are asked to compensate Dr. Alvarez in tort under the law of nations. The decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make. They, unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security. After today's ruling, if the political branches are intent on protecting the security interests of our nation by arresting and prosecuting those who would do the country harm, Congress and the President should also ensure that the United States Treasury is well-stocked to compensate the captured miscreants.

In light of the statutory authority under which the agents secured Alvarez's arrest in Mexico, the contention that their action was compensable in tort under the FTCA must fail. The district court did not err in granting summary judgment to the United States on the FTCA claims.

GOULD, Circuit Judge, dissenting:

I respectfully dissent because this case presents a non-justiciable political question requiring scrutiny of an executive branch foreign policy decision. The majority passes judgment on an executive branch decision to act against foreign nationals on foreign soil in a matter directly affecting the United States's relations with a foreign nation.[1] Because our Constitution entrusts the conduct of our nation's foreign policy to Congress and to the executive branch, this case poses a political question decidedly inappropriate for judicial review.

The Supreme Court has held that certain allegations of illegal government action should not be ruled on by the federal courts even though all jurisdictional requirements are met. The Court has said that decision in these areas should be left to the politically accountable branches of government, the executive branch and Congress. The reasons for this political question doctrine have been variously described,[2] but, at its core, the political question doctrine represents the judiciary's wise recognition that the structure of our Constitution, its separation of powers, requires judicial restraint when certain subjects are at issue.

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[1] Alvarez's apprehension by Mexican nationals was directed by the Drug Enforcement Administration (DEA), acting under authority delegated from the Attorney General.

[2] The political question doctrine minimizes judicial intrusion into the operations of the other branches of government. *See Gilligan v. Morgan*, 413 U.S. 1, 7, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973). It limits the courts' role in a democratic society. Alexander Bickel, *The Least Dangerous Branch* 184 (1962). It preserves the courts' legitimacy. *Baker v. Carr*, 369 U.S. 186, 267, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (Frankfurter, J., dissenting). And it allocates decisions to the branches of government that have superior expertise. *See* Fritz Scharpf, *Judicial Review and the Political Question: 4 Functional Analysis*, 75 Yale L.J. 517, 567 (1966).

The Supreme Court in *Baker v. Carr* made the classic statement of the considerations that animate the political question doctrine:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or an unusual need or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The Court held that any one of the above-listed characteristics may be sufficient to preclude judicial review. *Id.*

Most significantly for this case, the Court has held that the considerations described in *Baker v. Carr* bar judges from reviewing the executive branch's foreign policy decisions:

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.

Chicago & S. Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948). *See also Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309,

62 L.Ed. 726 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislat[ure,] 'the political' Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315, 57 S.Ct. 216, 81 L.Ed. 255 (1936) (holding nonjusticiable the question of the legality of a congressional resolution because "[t]he whole aim of the resolution [was] to affect a situation entirely external to the United States, and falling within the category of foreign affairs"). In other words, judges should not interfere in the management of our nation's foreign policy by opining (as the majority opines) on the executive's foreign policy decisions.

The DEA officials' decision to abduct Alvarez from Mexico without the Mexican government's permission was an executive foreign policy decision. Soon after a federal grand jury indicted Alvarez for murder, DEA officials negotiated with Mexican government officials for Alvarez's capture. When those negotiations proved unsuccessful, DEA officials decided it would be in the United States's interest to accomplish Alvarez's capture by means other than extradition. The officials' decision was consistent with a United States policy, formally announced in 1989, that it was permissible for law enforcement agencies such as the DEA to apprehend individuals accused of violating United States criminal law in foreign states without the consent of the foreign state. Barry E. Carter & Phillip R. Trimble, *International Law* 794 (3d ed. 1999).

The foreign-policy nature of the DEA officials' decision to order Alvarez's capture in Mexico is amply demonstrated by the world's response to the incident. Mexico requested an official report on the role of the United States in the abduction and later sent diplomatic notes of protest from its embassy to the United States Department of State. Mexico

also requested the arrest and extradition of the American law enforcement agents allegedly involved in the abduction. After the United States Supreme Court declined to invalidate Alvarez's capture, twenty-one member states of the Ibero-American Conference argued before the United Nations General Assembly that the extraterritorial exercise of criminal jurisdiction through the use of unilateral measures of coercion, such as abductions, violates the law of nations. Virginia Morris & M.-Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Forty-Eighth Session of the UN General Assembly*, 88 Am. J. Int'l L. 343, 357 (1994). The Iranian Parliament passed a draft law giving the president of Iran the right to arrest Americans who take action against Iranian citizens or property anywhere in the world and to bring them to Iran for trial. Carter and Trimble, *supra*, at 794. The Canadian Minster of External Affairs told the Canadian Parliament that any attempt by the United States to kidnap someone in Canada would be regarded as a criminal act and a violation of the U.S.-Canada extradition treaty. *Id.* at 792. The lower house of Uruguay's parliament voted that the United States's policy of unilaterally abducting foreign nationals showed "a lack of understanding of the most elemental norms of international law, and in particular an absolute perversion of the function of extradition treaties." *Id.* The presidents of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay issued a declaration expressing their concern. *Id.* These are only a few of the dozens of acts of diplomatic protest to the United States's policy of extra-territorial abduction, of which Alvarez's capture was the first well-publicized example.

The international response to Alvarez's capture was predictable, and executive officials may well have weighed it in determining whether to order that action. If the capture were merely an "exercise of the executive's law enforcement powers," as the majority suggests, rather than a foreign policy decision, the capture would not have become an international

diplomatic incident. Indeed, the foreign-policy ramifications of international abduction have been well-known for decades, at least since the United Nations Security Council determined in 1960 that Israeli agents' abduction of the Nazi war criminal Adolf Eichmann from Argentina violated that country's sovereignty. Mary Alice Kovac, *Apprehension of War Crimes Indictees: Should the United Nations' Courts Outsource Private Actors to Catch Them?*, 51 Cath. U.L. Rev. 619, 631 (2002).

The foreign-policy nature of the decision to capture Alvarez is also demonstrated by the executive branch's policies governing this type of arrest. Executive branch officials have told Congress that agents follow

> procedures designed to ensure that U.S. law enforcement activities overseas fully take into account foreign relations and international law. These procedures require that decisions as to extraordinary renditions from foreign territories be subject to full inter agency coordination and that they be considered at the highest levels of the government.

Carter and Trimble, *supra*, at 794. The Department of Justice has codified these special foreign-policy procedures in its United States Attorneys' Manual:

> Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the use of private persons, like bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation.

Department of Justice, *United States Attorneys' Manual*, § 9-15.610 (1997). These executive branch procedures

demonstrate that the capture of a foreign national on foreign soil is no ordinary law enforcement choice; rather, it is a serious foreign policy decision.

The DEA officials' decision to order the capture of a foreign national on foreign soil involved delicate foreign policy questions: Did the need to prosecute Alvarez for the torture and murder of an American official justify the United States's taking actions that might offend Mexico's government? Did the desire to send a tough message to foreign governments and drug cartels[3] justify the United States's taking actions that might offend other nations' conceptions of international law? Did the benefits to the United States of ordering Alvarez's capture outweigh any potential diplomatic or trade retaliation Mexico might take?

These questions, and other questions DEA officials may have considered (some of them beyond a judge's imagining), are beyond the competence and jurisdiction of federal judges. Unlike DEA officials, federal judges do not negotiate with foreign officials on behalf of the United States. Federal judges do not seek to influence foreign governments to accomplish the United States's policy objectives. Federal judges do not specialize in combating the international drug trade. Federal judges do not routinely work with the State Department. Federal judges do not commonly maintain relationships with overseas officials. Federal judges do not possess special training or knowledge relevant to drug interdiction on foreign soil.

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[3] Alan J. Kreczko, then Deputy Legal Adviser to the State Department, told Congress that some foreign governments "noted in private that [the United States policy of apprehending criminals overseas] will cause narcotics traffickers to have an increased fear of apprehension by the United States." Carter and Trimble, *supra*, at 794. Executive officials may have weighed this potential benefit to the United States when deciding whether to order Alvarez's capture on Mexican soil.

Despite these deficits, the majority passes judgment on the executive branch's conduct of its constitutionally assigned responsibility. In doing so, the majority interferes with a delicate and complex decision "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Waterman*, 333 U.S. at 111, 68 S.Ct. 431. *See also Baker*, 369 U.S. at 211, 82 S.Ct. 691 (noting that foreign policy issues "frequently turn on standards that defy judicial application or involve the exercise of a discretion demonstrably committed to the executive or legislature").

The majority's decision injects a new and worrisome factor into executive officials' foreign policy calculus. Executive officials now must consider not only the international implications of their decisions, but also the possibility that federal judges, and eventually juries,[4] will disapprove of their management of the nation's foreign policy. When executive officials consider whether to order action on foreign soil, they should properly weigh the possibility of diplomatic protests, international friction, and trade sanctions. They should *not* be required also to weigh the possibility of tort lawsuits by foreign nationals seeking punitive damages in their own nation's courts. They should *not* be required to consider the possible embarrassment such lawsuits will entail for them or for the United States. The majority's error allows the fear of tort lawsuits to taint officials' already complicated foreign policy analysis. *Cf. Johnson v. Eisentrager*, 339 U.S. 763, 789, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—

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[4] We should be concerned with the possibility that parties will urge juries with no foreign policy expertise to "send a message" to the United States government that particular foreign policy actions violate international norms of civilized conduct, as advanced by self-interested advocates. This is no way to conduct a foreign policy.

even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.").

The majority's second-guessing of the executive branch's decision to capture Alvarez is also unseemly in that it prevents our government from speaking with a single voice on an important foreign policy decision. This feature of the majority decision is inconsistent with the Supreme Court's *Baker v. Carr* decision, which identified "multifarious pronouncements by various departments on one question" as an evil against which the political question doctrine guards. *See Baker*, 369 U.S. at 217, 82 S.Ct. *691*. *See also id.* at 211, 82 S.Ct. 691 (noting that foreign policy questions "uniquely demand single-voiced statement of the Government's views"). By effectively taking the side of Mexico in this international dispute, the majority invades the province of the executive branch and embarrasses the United States on the international stage. The majority decision undermines not only the United States's foreign policy objectives, but also the unelected judiciary's fragile legitimacy with the American public.

The majority makes an unconvincing effort to limit its decision's scope.[5] Despite that effort, the grave implications of the majority decision are plain. By holding that federal courts can review for compliance with international law executive branch decisions to act against foreign nationals on foreign soil, the majority transforms the executive branch's foreign policy decisions into occasions for judicial review. The detention and interrogation of suspected terrorists in

[5] Perhaps recognizing the manifold difficulties its decision creates, the majority attempts to limit its holding by reciting that it "does not speak to the authority of other enforcement agencies or the military, nor to the capacity of the Executive to detain terrorists or other fugitives under circumstances that may implicate our national security interests." I am concerned that the line the majority tries to draw in limiting its decision is more illusory than real.

Afghanistan; the bombing of Iraq; intelligence gathering around the world-under the majority's holding, these and other foreign policy actions may be the next subject of federal court litigation. The majority unintentionally licenses the United States's enemies, or those who desire to embarrass the United States, to use the federal courts for the purpose of propaganda or to accomplish more insidious ends. This use of the federal courts is altogether inappropriate, and the political question doctrine should guard against it.

The Supreme Court's past decisions in cases implicating foreign policy underscore the need to dismiss this case because it presents a nonjusticiable political question. The Supreme Court has held that it is improper for a court to review the executive's recognition of a foreign government, *Oetjen,* 246 U.S. at 302; to review the executive's determination that an individual claiming immunity possess diplomatic status, *In re Baiz*, 135 U.S. 403, 432, 10 S.Ct. 854, 34 L.Ed. 222 (1890); to review the executive's determination that a ship owned by a foreign nation is immune from in rem jurisdiction, *Ex Parte Peru*, 318 U.S. 578, 588-89, 63 S.Ct. 793, 87 L.Ed. 1014 (1943); to review the constitutionality of an undeclared war, *Atlee v. Richardson*, 411 U.S. 911, 911, 93 S.Ct. 1545, 36 L.Ed.2d 304 (1973) (affirming, without opinion, *Atlee v. Laird*, 347 F.Supp. 689, 705-07 (E.D. Penn.1972)); to review the political branches' decision to prohibit arms sales to certain countries, *Curtiss-Wright*, 299 U.S. at 315, 329, 57 S.Ct. 216; to review the executive's assignment of foreign air routes, *Waterman*, 333 U.S. at 113-14, 68 S.Ct. 431; to review the political branches' determinations of when hostilities on foreign soil began or ended, *Ludecke v. Watkins*, 335 U.S. 160, 167-69, 68 S.Ct. 1429, 92 L.Ed. 1881 (1948); and, most relevant to this case, to judge whether the executive acted unlawfully in sending American troops to foreign soil. *Eisentrager*, 339 U.S. at 788-89, 70 S.Ct. 936.

An exercise of jurisdiction by federal courts in these cases deemed nonjusticiable by the Supreme Court-like the majority's exercise of jurisdiction in this case-would have divided our nation's government, pitting the judiciary against the political departments in matters involving our nation's conduct of foreign affairs. The majority's holding today that courts may review executive branch decisions to act against foreign nationals on foreign soil for compliance with international law poses at least as great a threat to our nation's foreign policy as did judicial review in the cases described above.[6] The Supreme Court, for more than a century, has consistently rejected the attempts of interested litigants to use the federal courts as a weapon against the political branches' conduct of foreign affairs. It is unfortunate that the majority does not likewise recognize this restraint on our judicial power.

The Supreme Court's cases on the nonjusticiability of foreign policy decisions are not the only Supreme Court pronouncements that require us to reject Alvarez's lawsuit. The Supreme Court's enumeration in *Baker v. Carr* of the considerations relevant to determining whether a case presents a political question also requires dismissal. First, the majority's review of the executive branch decision to capture Alvarez ignores our Constitution's commitment of foreign policy decisions to Congress and the executive. *See Baker*, 369 U.S. at 217, 82 S.Ct. 691 (referring to "commitment of the issue to a coordinate political department" and a "policy determination of a kind clearly for nonjudicial discretion"). Second, it ignores the fact that federal judges lack the knowledge or training or tools to decide when such action is

[6] This case should have been dismissed not only as to the United States and the DEA agent defendant, but also as to Francisco Sosa, for he was acting under the direction of the United States, and it would be difficult to decide the propriety of his actions without commenting on the propriety of the executive's actions.

appropriate for the United States's foreign policy. *See id.* (referring to "a lack of judicially discoverable and manageable standards"). Third, it shows disrespect for the executive branch's management of foreign policy. *See id.* (referring to "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"). Fourth, it causes our government to speak with inconsistent voices about an issue on which our government should speak with one voice. *See id.* (referring to "the potentiality of embarrassment from multifarious pronouncements by various departments on one question" and "an unusual need for unquestioning adherence to a political decision already made").

Any *one* of the *Baker v. Carr* considerations is sufficient to render a case nonjusticiable. *Id.; Made in the USA Found. v. United States*, 242 F.3d 1300, 1312 (11th Cir.2001). In this case, *all* of the *Baker v. Carr* considerations weigh sharply in favor of nonjusticiability. The majority errs by deciding the merits of this case.[7]

Human nature being what it is, and judicial nature following human nature, it is only natural that well-meaning judges will desire to comment on important affairs of the day involving political relations with other nations.[8] But if the

[7] If I am mistaken that this case must be dismissed as presenting a nonjusticiable political question, then I agree with Judge O'Scannlain's dissenting opinion that federal law authorized the DEA agents' conduct. *See supra* at 645 (en banc) (O'Scannlain, J., dissenting).

[8] It is not surprising that judges would want to promote the rule of law, including international law, particularly if they can have the last word on what that law requires. But that is no justification for an improvident exercise of an essentially political power concerning foreign affairs. The failure of my colleagues in the majority to address the political question doctrine, and the modest attention given it by my colleagues in dissent, *see supra* at 646-647 n. 2 (O'Scannlain, J., dissenting), might be explained by the government's failure to raise this issue. However, because the political question doctrine affects our jurisdiction, and because the

judiciary is to preserve its legitimacy, to show the respect due coordinate branches of government, and to avoid interfering in our nation's foreign relations, judges must show more restraint than the majority shows today. If ever there was a case in which the Supreme Court should revisit the political question doctrine and limit judicial interference in questions "in their nature political," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), this is that case.[9]

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political implications of this case for executive branch actions on foreign soil affecting relations with foreign nations are grave and apparent, I believe the issue must be considered sua sponte and fronted. Of course, it is not too late for the government, in seeking corrective review by petition for writ of certiorari, to advance the position that the political question doctrine precludes jurisdiction.

[9] Even if this case did not present a nonjusticiable political question, it still should have been dismissed in part for lack of jurisdiction because the United States has not waived its sovereign immunity from lawsuits based upon the "discretionary functions" of government employees. *See* 28 U.S.C. § 2680(a). Because DEA officials' decision to order Alvarez's capture involved an element of judgment or choice based on considerations of public policy, *United States v. Gaubert*, 499 U.S. 315, 322-23, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991), it was a discretionary function that cannot be the subject of litigation against the United States. This jurisdictional flaw is not waivable, so the parties' failure to argue it does not justify our not considering it. *See, e.g., In re Di Giorgio*, 134 F.3d 971, 974 (9th Cir.1998). The claims against the United States and its employees could not proceed. The United States's sovereign immunity would not, however, prevent our exercising jurisdiction over Alvarez's claims against Sosa.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 99-56762, 99-56880

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; HECTOR BERELLEZ; BILL WATERS; PETE GRUDEN; JACK LAWN; ANTONIO GARATE-BUSTAMANTE; FRANCISCO SOSA, and five unnamed Mexican nationals currently in the federal witness protection program,
Defendants-Appellees,

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee,

v.

FRANCISCO SOSA, and five unnamed Mexican nationals currently in the federal witness protection program,
Defendants-Appellants.

Argued and Submitted June 11, 2001.
Filed Sept. 11, 2001.

Appeal from the United States District Court for the Central District of California; Stephen V. Wilson, District Judge, Presiding. D.C. No. CV 93-04072- SVW-06, D.C. No. CV 93-04072-SVW.

Before: SCHROEDER, Chief Judge, GOODWIN, Circuit Judge, and KING,[1] District Judge.

GOODWIN, Circuit Judge:

The appeal and cross-appeals in this case challenge a number of rulings in the litigation which followed the arrest of Humberto Alvarez-Machain ("Alvarez") at his office in Guadalajara by Mexican civilians, including Jose Francisco Sosa ("Sosa"), at the behest of United States Drug Enforcement Agency ("DEA") agents.

FACTUAL & PROCEDURAL BACKGROUND

Alvarez is a medical doctor. He practices in Guadalajara, Jalisco, Mexico. In February, 1985, DEA Special Agent Enrique Camarena-Salazar ("Camarena") was abducted and brought to Guadalajara, tortured, and murdered. Alvarez was present at the house where Camarena was held. In 1990 a federal grand jury in Los Angeles indicted Alvarez for his involvement in the incident, and a warrant was issued for his arrest. DEA Headquarters approved the employment of Mexican nationals to apprehend Alvarez in Mexico and to bring him to the United States. The DEA hired Garate-Bustamente ("Garate"), a Mexican informant, to contact Mexican nationals whom he believed could help in apprehending Alvarez in Mexico. Garate contacted a Mexican businessman, Ignacio Barragan ("Barragan") to assist in the operation. In March, 1990, Barragan asked a former Mexican policeman, Sosa, to participate in Alvarez's apprehension. Barragan told Sosa that the DEA had a warrant for Alvarez's arrest, would pay the operation's expenses, and, if he succeeded in bringing Alvarez to the United States, would recommend Sosa for a Mexican government position.

[1] Honorable Samuel P. King, Senior United States District Judge, for the District of Hawaii, sitting by designation.

On April 2, 1990, Sosa and others apprehended Alvarez at his office and held him overnight at a motel. The next day, they flew Alvarez to El Paso, Texas, where federal agents arrested him. Less than twenty-four hours passed between Alvarez's apprehension in Mexico and his transfer to federal custody in El Paso.

Alvarez was brought to Los Angeles for trial and remained in detention from April 1990 until December 1992. Alvarez argued that the federal courts lacked jurisdiction to try him because his arrest violated the United States-Mexico Extradition Treaty. *See United States v. Caro-Quintero*, 745 F.Supp. 599, 601 (C.D.Cal.1990). The district court and the Ninth Circuit agreed with him, *see id.* at 614 and *United States v. Alvarez-Machain*, 946 F.2d 1466, 1466-67 (9th Cir.1991), but the Supreme Court disagreed and remanded the case for trial. *See United States v. Alvarez-Machain*, 504 U.S. 655, 669-70, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). Alvarez was acquitted, *see Alvarez-Machain v. United States*, 107 F.3d 696, 699 (9th Cir. 1996), and he returned to Mexico.

On July 9, 1993, Alvarez filed this action in which he asserted against the United States, Sosa, Garate, five unnamed Mexican civilians, and DEA agents Jack Lawn, Peter Gruden, William Waters, and Hector Berrellez the following claims: (1) kidnaping, (2) torture, (3) cruel and inhuman and degrading treatment or punishment, (4) arbitrary detention, (5) assault and battery, (6) false imprisonment, (7) intentional infliction of emotional distress, (8) false arrest, (9) negligent employment, (10) negligent infliction of emotional distress, and (11) various constitutional torts. The defendants moved to dismiss the complaint. The district court in 1995 granted the motion in part and denied the motion in part. We affirmed in part, reversed in part, and remanded the matter to the district court. *See Alvarez-Machain*, 107 F.3d at 701.

On summary judgment, the district court entered a judgment against Sosa for kidnaping and arbitrary detention

under the Alien Tort Claims Act ("ATCA"). The district court held that Alvarez could recover damages only for his detention prior to his arrival in the United States, applied United States rather than Mexican damage laws, and awarded Alvarez $25,000. The district court substituted the United States for the DEA agents and dismissed Alvarez's Federal Tort Claims Act ("FTCA") claims. Alvarez has appealed the district court's decision to substitute the United States for the DEA agents and its dismissal of his FTCA claims of false arrest, false imprisonment, kidnaping, and intentional and negligent infliction of emotional distress. He also appeals the district court's decision to limit damages to those imposed for his imprisonment in Mexico. He has dropped his allegations of mistreatment in Mexico and in the United States and the related causes of actions. Sosa appeals the judgment against him and assigns error to the district court's choice of federal common law of damages on the ATCA claim. The parties have stipulated to the dismissal of Alvarez's case against Garate.

Alvarez's ATCA claim

The district court found two independent grounds for sustaining jurisdiction and a claim for relief against Sosa for kidnaping under the ATCA. First, it held that state-sponsored abduction within the territory of another state without its consent is a violation of international law of sovereignty. Second, it held that state-sponsored abduction violates customary norms of international human rights law. We hold that Alvarez has standing to recover under the ATCA based only on the second ground.

A. Meaning of "Law of Nations"

The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1993). Sosa argues

on appeal that only violations of *jus cogens* norms are actionable under the ATCA. *Jus cogens* norms are "rules of international law [that] are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them." Restatement (Third) of Foreign Relations Law § 102, cmt. k. However, Sosa's contention that there must be *a jus cogens* violation for the ATCA to apply finds no support in cited cases. ATCA cases have held that the norm must be "specific, universal, and obligatory." *In re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir.1994); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir.1998). This Court has held that a *jus cogens* violation satisfies the "specific, universal, and obligatory" standard, *Hilao v. Estate of Marcos*, 103 F.3d 789, 795 (9th Cir.1996), but it has never held that *a jus cogens* violation is required to meet the standard. In *Martinez*, 141 F.3d at 1383, we stated that arbitrary arrest and detention were actionable under the ATCA, but did not consider whether they constituted *jus cogens*. We have recognized that the "law of nations," the antecedent to customary international law, and *jus cogens* are related but distinct concepts. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-16 (9th Cir.199!). Therefore, we reject Sosa's argument that the ATCA requires a violation of *a jus cogens* norm and decline to decide whether arbitrary detention and kidnaping reach this heightened standard.

B. Mexican Sovereignty

Alvarez's claim that Sosa should be liable under the ATCA because his kidnaping violated Mexican territorial sovereignty fails. Alvarez lacks standing to sue for the violation. The Supreme Court has held that "the irreducible constitutional minimum of standing contains three elements:" (1) an "'injury in fact'—an invasion of a legally protected interest

which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical,'" (2) a "causal connection between the injury and the conduct complained ofthe injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court,'" and (3) the likeliness that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations omitted). Alvarez's abduction does not satisfy the *Lujan* test, because Alvarez does not have a legally protected interest in Mexican sovereignty. As the Fifth Circuit has explained, "it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress." *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir.1988) (discussing an individual's lack of standing to sue for a violation of an international treaty). Only Mexico has standing to object to encroachments on its territorial sovereignty.

C. Rights to Freedom of Movement, to Remain in One's Country, and Security in One's Person

Alvarez's kidnaping was nonetheless a violation of the "law of nations" because it violated customary international human rights law. The Supreme Court has stated that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 5 Wheat. 153, 18 U.S. 153, 160-61, 5 L.Ed. 57 (1820); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2nd Cir.1980). *See also The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900) (stating "where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of

jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."). The Second Circuit also has used United Nations ("U.N.") declarations as evidence of the law of nations:

> These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter . . . Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty'" against "non-binding pronouncement," but is rather an authoritative statement of the international community.

Filartiga, 630 F.2d at 883. Sosa cites the Restatement of Foreign Relations law for the proposition that no human rights instrument states explicitly that forcible abduction violates international human rights law. *See* Restatement (Third) of Foreign Relations Law of the United States § 432 n. 1 (1987) ("none of the individual human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law"). Sosa fails to mention that the Restatement continues:

> However, Articles 3, 5, and 9 of the Universal Declaration of Human Rights, as well as Articles 7, 9 and 10 of the International Covenant on Civil and Political Rights might be invoked in support of such a view. In 1981 the Human Rights Committee established pursuant to Article 28 of the Covenant decided that the abduction of a Uruguayan refugee from Argentina by Uruguayan security officers constituted arbitrary arrest and detention in violation of Article 9(1). 36 U.N. GAOR, Supp. No. 40, at 176-84 (1981), see also id. at 185-89.

Id.

Although no international human rights instruments refers to transborder abduction specifically, various established international human rights norms, like the rights to freedom of movement, to remain in one's country, and to security in one's person, encompass it. Neither Sosa nor the Government challenges Alvarez's standing to claim a violation of his individual human and civil rights.

A number of international human rights instruments, which are evidence of customary international law, see *Siderman*, 965 F.2d at 716, assert the right of an individual to liberty and security. The American Convention on Human Rights (hereinafter "American Convention") provides that "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto" and that "[n]o one shall be subject to arbitrary arrest or imprisonment." O.A.S. Official Records, arts. 7(2)7(3), OEA/Ser.K/XVU1.1, Doc. 65, Rev. 1, Corr. 2 (1970) (signed but not ratified by the United States), reprinted in 9 I.L.M. 673, 676 (1970).

Alvarez's abduction occurred pursuant neither to the laws of Mexico nor to the laws of the United States. The Universal Declaration of Human Rights (hereinafter "Universal Declaration") provides that "[e]veryone has the right to freedom of movement and residence within the borders of each State." G.A. Res. 217A(III), 3 U.N. GAOR Supp. No. 16, U.N. Doc. A/810 (1948), art. 13(1). The International Covenant on Civil and Political Rights ("ICCPR") reiterates this guarantee. *See* ICCPR, art. 12, adopted Dec. 16, 1966, S. Treaty Doc. 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, entered into force for the United States Sept. 8, 1992). By kidnaping Alvarez and taking him to the United States, Sosa encroached on his rights to freedom of movement and residence.

Regional agreements also affirm the rights of freedom of movement and residence. The American Declaration of the Rights and Duties of Man, (hereinafter "American Declaration"), arts. 1, 8, OAS Doc. OEA/Ser. L/V/II.65, Doc. 6, pp. 19-25, May 2, 1948, asserts every person's right to "liberty and security of his person, to 'fix his residence within the territory of the state of which he is a national, . . . and not to leave it except by his own will.'" The American Convention echoes the American Declaration's guarantees of the right to personal liberty and security, and the right not to be expelled from the territory of the state of one's nationality. American Convention, arts. 7, 22. *See also* Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 22, 1984, Europ. No. 117, 24 I.L.M. 435 (1985); African Charter on Human and Peoples' Rights, art. 12, June 27, 1981, 21 I.L.M. 58, 60. Here, Sosa and his fellow kidnapers forced Alvarez to leave Mexico against his will.

Thus, we agree with the district court that Alvarez's kidnaping violated his rights to freedom of movement, to remain in his country, and to security in his person, which are part of the "law of nations."

D. Arbitrary detention

Alvarez's seizure also violated the international customary legal norm against arbitrary detention. This Circuit has found a "clear international prohibition against arbitrary arrest and detention" and has held that the ATCA reaches this conduct. *Martinez*, 141 F.3d at 1384. In *Martinez*, we held that the detention was not arbitrary because it was pursuant to a valid Mexican warrant. *See id.* Alvarez argues that, under *Martinez*, his arrest and detention were arbitrary because there was no Mexican warrant or any lawful authority for his arrest. We agree.

According to *Martinez*, "detention is arbitrary if 'it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Id.* (quoting Restatement of Foreign Relations law § 702 cmt. h). The district court held that the detention was arbitrary, because the United States warrant for Alvarez's arrest had no legal effect in Mexico, and the DEA had no legal authority for kidnaping him. A warrant issued by a United States court is valid only "within the jurisdiction of the United States." *See* Fed.R.Crim.P. 4(d)(2).

The *Martinez* court also noted: "[d]etention is arbitrary if 'it is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time.'" *Id.* Sosa argues that this statement encompasses the *Martinez* "test" for arbitrariness under international law. He does not explain how the "not pursuant to law" or "incompatible with the principles of justice or with the dignity of the human person" statements fit into the test. It would be more accurate to treat this second statement as an illustrative, not exhaustive, list of circumstances that make a detention arbitrary.

Sosa also maintains that Alvarez's detention was not prohibited by international law because it was not "prolonged." He argues that because the plaintiff in *Martinez* was detained illegally for 59 days, *see Martinez*, 141 F.3d at 1377, and Alvarez was held for less than twenty-four hours in Mexico, his detention was not actionable. However, the *Martinez* court set no time component in its arbitrary detention rule. The Court said simply: "there is a clear international prohibition against arbitrary arrest and detention," and cited Article 9 of the Universal Declaration and Article 9 of the ICCPR, neither of which include a temporal component. *Martinez*, 141 F.3d at 1384.

A kidnaping that ends in the death of a victim may have a duration of less than an hour. The effect on the victim has nothing to do with duration of the wrongful act. Accordingly, we hold that Alvarez's detention was arbitrary and, therefore, violated the "law of nations."

Substitution of the United States under 28 U.S.C. § 2679

The district court did not err in substituting the United States for the individual DEA defendants. Whether the district court erred in substituting the United States under 28 U.S.C. § 2679 is a matter of statutory interpretation and is therefore reviewed de novo. *See United States v. Juvenile Male (Kenneth C.)*, 241 F.3d 684, 686 (9th Cir.2001).

Alvarez argues that the district court erred in its January 1995 order determining that Alvarez's claims under the ATCA were subject to substitution under the Federal Employees Liability Reform and Tort Compensation Act ("Liability Reform Act"), 28 U.S.C. § 2679 (1994). The Liability Reform Act provides that for most civil actions based on the wrongful conduct of federal employees acting within the scope of their employment, the only remedy is a FTCA lawsuit against the government itself. *See* 28 U.S.C. § 2679(b)(1) (1994). However, the exclusive remedy provision "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B).

The district court held that an action under the ATCA was not exempt from the exclusive remedy provision of the Liability Reform Act. It reasoned that "it is international law, not the ATCA," that gives individuals fundamental rights. Therefore, a claim under the ATCA is based on a violation of international law, not of the ATCA itself.

This reading is consistent with the Supreme Court's reasoning in *United States v. Smith*, 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991). In *Smith*, the Court rejected the argument that a claim for medical malpractice was "authorized" by the Gonzalez Act and therefore fit the 28 U.S.C. § 2679(b)(2)(B) exception for violations of a statute. The court explained: "[n]othing in the Gonzalez Act imposes any obligations or duties of care upon military physicians. Consequently, a physician allegedly committing malpractice under state or foreign law does not 'violate' the Gonzalez Act." *Smith*, 499 U.S. at 174, 111 S.Ct. 1180.[2] The same can be said of the ATCA. The language of § 1350 creates no obligations or duties. Admittedly, the ATCA differs from the Gonzalez Act in that it creates a cause of action for violations of international law, whereas the Gonzalez Act limited the common law liability of doctors. *See In re Estate of Marcos*, 25 F.3d at 1475 (rejecting the argument that the ATCA is merely jurisdictional); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir.1996); *Filartiga*, 630 F.2d at 885-86. Nonetheless, we find nothing in this distinction to cause us to deviate from the plain language of the statute. We therefore agree with the district court that Alvarez's claims under the ATCA were subject to substitution under the Liability Reform Act. Accordingly, Alvarez's exclusive remedy against the United States, in lieu of the DEA agents, is through the FTCA.

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[2] The relevant provision of the Gonzalez Act provides:

> "The remedy against the United States provided by [the FTCA] for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician . . . of the armed forces . . . while acting within the scope of his duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician . . . whose act or omission gave rise to such action or proceeding."

10 U.S.C. § 1089(a) (1998).

FTCA claims against the United States

The FTCA acts as a waiver of the United States' sovereign immunity for certain torts committed by its employees. 28 U.S.C. §§ 1346(b), 2674. The statute provides that "[t]he United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances. . . ." 28 U.S.C. § 2674 (1994). We review *de novo* the district court's determination of subject matter jurisdiction under the FTCA. *See Brady v. United States*, 211 F.3d 499, 502 (9th Cir.) cert. denied, 531 U.S. 1037, 121 S.Ct. 627, 148 L.Ed.2d 536 (2000).

A. The "Foreign Activities" Exception

We agree with the district court that the "foreign activities" exception to the FTCA does not apply to this case, because Alvarez asserted a valid "headquarters claim." The FTCA exempts from its coverage "any claim arising in a foreign country." 28 U.S.C. § 2680(k) (1994). This exemption "is more than a choice of law provision: it delineates the scope of the United States' waiver of sovereign immunity." *Smith v. United States*, 507 U.S. 197, 200, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993). However, creating the so-called "headquarters doctrine," the Supreme Court has held that the FTCA requires federal courts to look to the law of the place where the act took place, rather than the place where the act had its operative effect. *See Richards v. United States*, 369 U.S. 1, 10, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962).

The district court did not err in holding that Alvarez had stated a valid headquarters claim "with respect to his claim for false arrest/false imprisonment and intentional infliction of emotional distress from his seizure." Although the "operative effect" of Alvarez's kidnaping occurred in Mexico, all of the command decisions about his seizure and removal to the United States occurred in California. In *Leaf v. United States*, 588 F.2d 733, 735 (9th Cir.1978), this Court held that

a claim "arises, as that term is used in Sections 1346(b) and 2680(k), where the acts or omissions that proximately cause the loss take place."

Under California law, a person proximately causes a loss if his actions were a substantial factor in increasing the likelihood of the loss. *See Vickers v. United States*, 228 F.3d 944, 956 (9th Cir.2000). The DEA defendants' conduct not only created the risk that Alvarez would be abducted, it was the cause in fact. According to the district court, the DEA officers:

> sought individuals who could work in Mexico to bring Plaintiff to the United States. Government employees gave explicit instructions on the person it [sic] wanted seized, the background of those who would seize him, and how those individuals should treat him during his trip to the United States. At a later stage, government employees instructed the arrest team where to fly the plane and obtained clearance for the plane to land.

Moreover, as this Court explained in *Vickers:*

> It is well established under California law that the criminal or negligent acts of a third party do not break the causal link between the defendant's conduct and the alleged injuries, if the defendant's conduct created or increased the risk of such acts.

Vickers, 228 F.3d at 956. The involvement of Mexicans in physically seizing Alvarez did not break the chain of causation; they merely completed the chain. The DEA's planning assured that they would kidnap Alvarez.

As the district court noted, Alvarez's claims resemble those asserted in other cases in which courts have found valid headquarters claims and refused to apply the foreign claim exclusion. For example, in a case where the failure of the DEA and Customs to coordinate an operation led to the

incarceration of a number of individuals in Honduras, the Eleventh Circuit held that, although the actual arrest and injury occurred in Honduras, the negligent act or omission occurred in the United States. *See Couzado v. United States*, 105 F.3d 1389, 1394-96 (11th Cir.1997). *See also Sami v. United States*, 617 F.2d 755, 761-63 (D.C.Cir.1979) (applying headquarters doctrine to claim of false arrest where the arrest took place in Germany because the instructions to make the arrest occurred in the United States); *Donahue v. United States Dep't of Justice*, 751 F.Supp. 45, 48-49 (S.D.N.Y. 1990) (allowing a headquarters claim "insofar as the act of negligence is alleged to have occurred in the United States"); *Glickman v. United States*, 626 F.Supp. 171, 174 (S.D.N.Y. 1985) (holding that the "foreign country" exception did not bar an action filed by an American citizen who alleged that, while he was in Paris in 1952, a Central Intelligence Agency agent surreptitiously drugged him with LSD where the complaint alleged that the program to administer drugs to unwitting persons originated in the United States).

Cominotto v. United States, 802 F.2d 1127 (9th Cir.1986), a Ninth Circuit case in which the court refused to apply the headquarters doctrine, is distinguishable. In *Cominotto*, we held that the Federal Government's alleged negligence in failing to provide adequate guidance in connection with an undercover operation was not the proximate cause of the plaintiff's injuries and therefore did not fall under the headquarters doctrine. Cominotto, a DEA informant, violated Secret Service instructions by meeting suspects at night, entering their automobile, leaving Bangkok, and heading for a private meeting place. He was shot in the leg while "fleeing from a dangerous situation in which he had placed himself," and "was the sole and proximate cause of his injuries." *Id.* at 1130. As discussed above, nothing in Alvarez's case breaks the chain of causation. Sosa and his fellow abductors brought Alvarez to the United States pursuant to the plan of the United States government officials. The injury, Alvarez's

false arrest, occurred as a direct and intended result of the DEA's plans. Thus, the headquarters doctrine applies.

The United States argues that the headquarters doctrine does not apply to intentional torts, but cites little support for this contention. The Government argues that "there can be no question that a court, when choosing between two states for the purposes of the FTCA, would always find that the intentional tort 'occurred' where the alleged tortious act was committed." The only case it cites is a Fifth Circuit case, *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200, 205 n. 7 (5th Cir.1996), which applied Texas law to a claim of false imprisonment that took place in Texas pursuant to an arrest warrant issued in Louisiana. The *Landry* court's deciding a Texas state law claim of false imprisonment gives us little guidance in deciding a claim under the FTCA based on California law. We hold that the headquarters doctrine applies to intentional torts as well as cases of negligence and, therefore, applies to Alvarez's case.

B. False Arrest under the FTCA

1. Intentional Torts Exception

We agree with the district court that the intentional tort exception to the FTCA does not apply to Alvarez's case. The FTCA's waiver of sovereign immunity contains an exception for intentional torts, including false arrest, unless the intentional tort be committed by an "investigative or law enforcement officer." 28 U.S.C. § 2680(h) (1994). The statute defines an "investigative or law enforcement officer" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* The district court held that the intentional tort exception should not apply here because Alvarez's "claim contemplates liability for the actions of the

law enforcement officers in the United States and those individuals should face liability for instructing others to do what the law enforcement individuals could not."

Although Sosa is not an officer of the United States and is not "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law," he served as an agent or instrument for DEA agents who have these powers. *See 21* U.S.C. § 878(a)(2), (3), and (4) (1999). *See also Van Schaick v. United States*, 586 F.Supp. 1023, 1032-33 (D.S.C.1983) (holding that a county sheriff and a city police officer were investigative or law enforcement officers within the meaning of § 2680(h), because they were agents of the Assistant United States Attorney and the DEA agent, who directed them to make the arrest and secure the aircraft for the DEA). Indeed, as the district court explained, the policy reason for the "law enforcement officer" exception to the "intentional torts" exception to the FTCA-to "provid(e) a remedy against the Federal Government for innocent victims of Federal law enforcement abuses" applies here. Law enforcement officers cannot escape liability by recruiting civilians to do their dirty work.

As the district court noted, there appears to be no circuit law on point. The Eleventh circuit has dealt with the opposite situation where non-enforcement individuals tricked members of law enforcement into an arrest. *See Metz v. United States*, 788 F.2d 1528, 1531-32 (11th Cir.1986) (holding "that the provision permitting governmental liability on the basis of actions of law enforcement officers cannot be expanded to include governmental actors who procure law enforcement actions, but who are themselves not law enforcement officers").

Although there is no FTCA law on point, principles of Fourth Amendment law bolster our interpretation of the statute. The Fourth Amendment covers only government, not private, conduct, yet the Supreme Court has held that it

prohibits unreasonable intrusions by private individuals who are acting as government instruments or agents. *See Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The Ninth Circuit has adopted a test for determining whether "a private individual is acting as a governmental instrument or agent for Fourth Amendment purposes." *United States v. Reed*, 15 F.3d 928, 931 (9th Cir.1994). A court must ask: "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends." *Id.* These factors, although intended for Fourth Amendment analysis, are useful in determining whether Sosa acted as an agent or instrumentality of the DEA law enforcement agents when he arrested and kidnaped Alvarez. The government admits that it knew of and acquiesced in the plan to kidnap Alvarez and bring him to the United States. Sosa performed the search to assist the DEA agents. Sosa had no individual interest in kidnaping Alvarez other than to curry favor with the DEA agents in the hopes that they would reward him. Therefore, because Sosa acted merely as an agent or instrument for "law enforcement officers," the United States has waived sovereign immunity.

2. Merits of False Arrest Claim

The FTCA states that the liability of the United States should be determined "in accordance with the law of the place where the [allegedly tortious] act or omission occurred." 28 U.S.C. § 1346(b) (1993). The parties agree that, assuming the foreign claims exclusion act does not apply, California law should apply here. "Under California law, the torts of false arrest and false imprisonment are not separate torts, as false arrest is 'but one way of committing a false imprisonment.'" *Watts v. County of Sacramento*, 256 F.3d 886 (9th Cir.2001) (quoting *Asgari v. City of Los Angeles*, 15 Cal.4th 744, 63 Cal.Rptr.2d 842, 937 P.2d 273,

278 n. 3 (1997)). "A cause of action for false imprisonment based on unlawful arrest will lie where there was an arrest without process followed by imprisonment." *Watts*, 256 F.3d 886 (citing *City of Newport Beach v. Sasse*, 9 Cal.App.3d 803, 88 Cal.Rptr. 476, 480 (1970); *Dragna v. White*, 45 Cal.2d 469, 289 P.2d 428 (Cal.1955)). False imprisonment "consists of the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." *Scofield v. Critical Air Medicine, Inc.*, 45 Cal.App.4th 990, 1000, 52 Cal.Rptr.2d 915 (1996).

a. Authorization for arrest under federal law

Federal law did not give the DEA agents or Sosa "lawful privilege" to arrest Alvarez in Mexico. To determine whether a federal officer had lawful authority to carry out an arrest, a California court would first ask whether the arrest was authorized under federal law. *See Rhoden v. United States*, 55 F.3d 428, 431 (9th Cir.1995). Because Sosa acted as an agent or instrumentality for federal officers and had no independent authority for arresting Alvarez, we must ask whether the federal officers would have been authorized to arrest Alvarez.

The statute authorizing DEA enforcement neither expressly confers extraterritorial authority to the DEA nor expressly restricts its authority to the United States. We have held that agents of the Immigration and Naturalization Service ("INS") have the authority to conduct law enforcement activity outside the United States, even when Congress has not explicitly and directly conferred it on them, because Congress "has delegated broad enforcement powers to the Attorney General, who in turn has delegated those powers to the Commissioner of the INS, who in turn is authorized to delegate those powers to INS agents." *See United States v. Chen*, 2 F.3d 330, 333 (9th Cir.1993).

The Government argues that the DEA, like the INS, has extraterritorial authority. Indeed, Congress also drew the DEA's powers broadly. *See, e.g.*, 21 U.S.C. § 878(a)(3) (1999) (authorizing a DEA agent to "make arrests without warrant . . . for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony"); 21 U.S.C. § 878(a)(5) (authorizing the DEA to "perform such other law enforcement duties as the Attorney General may designate").

In other statutes where extraterritorial application was not explicit, courts have found it to be implied. *See, e.g., United States v. Cotten*, 471 F.2d 744, 751 (9th Cir.1973) (holding that "when a citizen of this country, while without the territorial jurisdiction of the United States, violates [a federal statute prohibiting the theft of government property], he is amenable to resulting criminal prosecution in United States District Courts"). The Government contends that substantive criminal statutes also indicate that Congress intended the DEA's authority not to be limited to the United States. *See, eg.*, 18 U.S.C. § 1201(e)(1) (2000) (giving the United States jurisdiction over kidnaper of internationally protected federal representatives, officers, or employees outside the United States).

As the Government also notes, other statutes appear to envision foreign law enforcement activity. Congress has authorized the military to supply equipment and assistance to federal law enforcement officers in a variety of extraterritorial operations, for example "the rendition of a suspected terrorist from a foreign country to the United States to stand trial." 10 U.S.C. § 374(b)(1)(D) (2001 Supp.). *See also* 18 U.S.C. §§ 351(g) (2000) (authorizing the military to assist in investigating kidnapings or assassinations of Congressional, Cabinet, and Supreme Court members) and 351(i) (2000) (providing for extraterritorial jurisdiction over the kidnaping and assassinations).

The Government contends that "in order for the DEA and other federal law enforcement agencies to fully execute [criminal] statutes, its arrest authority must have an equivalent extraterritorial scope." The Office of Legal Counsel used the same reasoning in an unpublished opinion, which discussed the authority of the Federal Bureau of Investigation to override international law to conduct extraterritorial law enforcement activities. *See* 13 Op. Off. Legal Counsel 163 (1989).

If this assertion is an accurate statement of United States law, then it reinforces the critics of American imperialism in the international community. An alternative interpretation would suppose that Congress intended for federal law enforcement officers to obtain lawful authority, which, for example, here might be a Mexican warrant, from the state in which they sought to arrest someone. *See* 10 U.S.C. § 374(b)(1)(D) (2001 Supp.) (providing that United States military assistance in rendering suspected terrorists to stand trial be "in accordance with other applicable law").

This reading of the DEA's authority complies with the United States' obligations under the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which provides that:

> 2. Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
>
> 3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are Exclusively reserved for the authorities of that other Party by its domestic law.

Art. 2(2)-(3), S. Treaty Doe. No. 4, 101st Cong., 1st Sess. 7, entered into force for the United States Nov. 11, 1990,

reprinted in 28 I.L.M. 497 (1989). Therefore, we hold that there was no lawful federal authority for Alvarez's kidnaping.

b. Authorization for arrest under California law

Nor did the officers or Sosa have lawful authority under California law to arrest Alvarez in Mexico. The district court held that even if the DEA did not have statutory authority to make an arrest on foreign soil, Alvarez's apprehension in Mexico was still not a "false arrest" under California law because it was something akin to a citizen's arrest. *See Padilla v. Meese*, 184 Cal.App.3d 1022, 229 Cal.Rptr. 310, 316 (1986) (holding that "[w]here an officer acts outside the scope of his statutory authority an arrest is not necessarily rendered unlawful" because it may be a lawful citizen's arrest).

However, the district court erred in turning to the law of citizen's arrests. We have held that "the proper source for determining the government's liability [for false imprisonment by IRS officers under the FTCA] is not the law of citizen's arrests, but rather the law governing arrests pursuant to warrants." *Arnsberg v. United States*, 757 F.2d 971, 979 (9th Cir.1985). In *Arnsberg*, the court reasoned that IRS agents had "law enforcement obligations, such as the duty to execute warrants, which private citizens lack," which made "the law of citizen arrests an inappropriate instrument for determining FTCA liability." *Id.* at 979. DEA agents Gruden, Lawn, Waters, and Berrellez, also had law enforcement obligations, including the duty to execute warrants, which private citizens lack. *See 21* U.S.C. § 878(2) (1999).

Ultimately, the *Arnsberg* court rejected the plaintiffs claim of false imprisonment under the FTCA because the agents, having attempted but failed to effect personal service and having followed the advice of a United States Attorney, "acted nearly perfectly," made only a "relatively minor and a relatively technical" error, and acted properly under the

general common law. *Arnsberg*, 757 F.2d at 979. The officers here did not act "nearly perfectly." They arranged the kidnaping of Alvarez outside of the jurisdiction of their United States warrant. The warrant did not suffer from "relatively minor" or "relatively technical" defects. While valid on its face, it simply had no effect in Mexico. The invalidity of the warrant for the purposes of Alvarez's arrest meant that the DEA agents did not act properly under the general common law. As the *Arnsberg* court noted, according to the Restatement (Second) of Torts, §§ 122-24 (1965), "an arrest is privileged if it is made pursuant to a warrant which is regular in form and which reasonably appears to have been issued by a court with jurisdiction." *Id.* Here, the Los Angeles court was of competent jurisdiction to issue a warrant for the arrest of an individual in the United States, but had no jurisdiction to issue a warrant for an arrest in Mexico. *See* Fed.R.Crim.P. 4(d)(2).

C. California Statutory Immunities

To the extent that the district court's opinion can be read to suggest that the DEA defendants were immune from a suit under the FTCA due to California statutory immunities, it is incorrect.[3] A number of cases have rejected attempts to limit

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[3] It appears that the district court did not hold that the DEA officers were immune. It noted that the parties were confusing matters by discussing immunity, because the defendants were not arguing that they were immune under state law, but rather that the arrest was not unlawful under state law. Despite arguing that immunity was not at issue, the district court suggested that it believed the officers could be immune from FTCA liability under state law. The court described *Ting v. United States*, 927 F.2d 1504, 1514 (9th Cir.1991) and *Arnsberg v. United States*, 757 F.2d 971 (9th Cir.1985) as cases in which the Ninth Circuit had applied state immunity principles to a claim of false arrest under the FTCA. The district court also declared that *Ting* "directly govern[ed]" Alvarez's case. As Alvarez notes, the *Ting* court did not decide whether state immunities under Cal. Civ. Cod § 43.55 could bar FTCA claims. Instead, it based its holding on the absence of malice, a requirement for the claim of false

FTCA liability based on state immunities. In *United States v. Muniz*, the Supreme Court rejected the application of state immunity for jailers in an FTCA suit. *See United States v. Muniz*, 374 U.S. 150, 164-66, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963). The Court explained: "we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity." *Id.* at 164-65, 83 S.Ct. 1850. *See also Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). Similarly, "[t]he Ninth Circuit has refused to grant immunity to federal officers based on state statutes that confer public entity immunity for the conduct of government employees in an action against the United States under the FTCA." *Stuart v. United States*, 23 F.3d 1483, 1488 (9th Cir. 1994). In *Stuart*, we held that a California statute that gave public entity immunity for peace officers in vehicular pursuits did not provide immunity to the United States in action under FTCA. *See id.* Because state privileges do not bar holding federal officers liable under the FTCA, the Court need not decide whether the arrest was privileged under California law.

Therefore, we hold that the arrest of Alvarez was a "false arrest," for which the United States is liable under the FTCA.

Choice of Law for ATCA Damages

The district court did not err in choosing to apply the federal common law rather than Mexican law in determining the amount of damages to award Alvarez for his ATCA claim against Sosa. This Court reviews de novo the district court's

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arrest. *See Ting* 927 F.2d at 1514. Nor does *Arnsberg* stand for the proposition that state immunities could bar an FTCA claim. In *Arnsberg*, the Court held that IRS agents who consulted with an assistant United States Attorney before they sought the warrant and could reasonably rely on the attorney's belief that the arrest was legal were insulated by qualified immunity under federal law in a Bivens action for executing invalid material witness arrest warrant, but that state citizen's arrest law did not apply. *Arnsberg*, 757 F.2d at 979, 981.

decision concerning the appropriate choice of law. *Abogados v. AT & T, Inc.*, 223 F.3d 932, 934 (9th Cir.2000). The district court applied federal common law because it concluded that applying Mexican law, which would limit the amount of damages and prevent the consideration of punitive damages, would "inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States." It explained that "the use of federal common law remedies, including the possibility of punitive damages, best serve[d] the end of the Alien Tort Claims Act."

Sosa maintains that the district court should have used Mexican law because the injury occurred in Mexico. Federal common law determines the choice of law rule, because the court heard the case under its federal question jurisdiction. *See Schoenberg v. Exportadora de Sal, S.A.*, 930 F.2d 777, 782 (9th Cir.1991). Federal common law follows the Restatement (Second) of Conflict of Laws ("Restatement of Conflicts"). *See id.* Sosa cites the Restatement provision on personal injuries for his claim that "there is a presumption that the law of the place where the injury occurs applies." *See* Restatement of Conflicts § 146. However, the Restatement does not classify this case as a personal injury case. Comment b to § 146 explains that

> A personal injury may involve either physical harm or mental disturbance, such as fright and shock, resulting from physical harm or from threatened physical harm or other injury to oneself or to another. On the other hand, injuries to a person's reputation or the violation of a person's right of privacy are not "personal injuries" in the sense here used.

Id. (citations and internal quotations omitted). Alvarez's claim is not based on the assaultive physical or mental harm suffered, but rather on the deprivation of his rights to be free from arbitrary arrest, to liberty, to remain in his country, and to freedom of movement.

Thus, the general principle on conflict of laws for tort claims is more useful here. Under the General Principle for torts announced in the Restatement of Conflicts § 145;

> The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

The Restatement of Conflicts § 6 provides a list of factors to be used to determine the appropriate rule of law, which include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement of Conflicts § 6.

Applying the § 6 factors to this case favors the choice of federal common law. The needs of the international system are too complex to dictate clearly the choice of either Mexican or federal common law. However, it is difficult to deny that encouraging states and individuals to comply with international law is beneficial and that damages for torts committed in violation of international law will encourage compliance. The United States, in enacting the ATCA, has expressed a policy to provide a cause of action and a federal

forum to fashion remedies for violations of international law. *See Abebe-Jira*, 72 F.3d at 848. The United States has an interest in other states' respecting the human rights of its citizens. Mexico has an interest in the United States doing the same. Moreover, "[s]ince it is the plaintiff[ ] and not the defendants who [is] the Mexican resident[ ] in this case, Mexico has no interest in applying its limitation of damages—Mexico has no defendant residents to protect and has no interest in denying full recovery to its residents injured by non-Mexican [sic] defendants." *Hurtado v. Superior Court of Sacramento County*, 11 Cal.3d 574, 114 Cal.Rptr. 106, 522 P.2d 666 (1974). Because this is an action in tort, not contract, the justified expectations factor does not apply. *See Lange v. Penn. Mut. Life Ins. Co.*, 843 F.2d 1175, 1180-81 (9th Cir.1988).

The remaining § 6 factors also favor the application of federal common law. The basic policies underlying international human rights law would be enhanced by selecting the stronger federal common law of damages. Potential violators of human rights norms should know that they will pay for their actions. Choosing federal common law enhances the certainty, predictability, and uniformity of damage awards under the ATCA, because the remedy will not depend on the laws of the country in which a violation occurred. Finally, because United States courts have more experience in applying federal common law than Mexican law, it will be easier for them to determine and apply the familiar law. Applying Mexican law, the court would face both language barriers and the need to become familiar with a civil code system of law.

Caveat: the Restatement § 145 also provides "contacts to be taken into account in applying the principles of § 6 . . ." It is less clear which laws these "contacts" favor. These contacts include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

Restatement of Conflicts § 145(2). The kidnaping occurred in Mexico. However, an important part of the conduct that caused the injury, the planning of the DEA, occurred in the United States. Alvarez and Sosa are both Mexican. Alvarez lives and works in Mexico. Although Sosa lived in Mexico before the kidnaping, he now lives in the United States. Nonetheless, we believe that the relationship between the parties is centered in the United States. Sosa abducted Alvarez pursuant to the agenda of United States DEA agents. The DEA agents wanted Alvarez apprehended in order to prosecute him in the United States for his alleged participation in the killing and torture of an American DEA agent in Mexico. In sum, although a case can be made for applying Mexican law, the district court did not err in choosing to apply federal common law.

Scope of damages

We agree with the district court that Alvarez cannot recover damages for his entire imprisonment in the United States. Whether Alvarez can recover damages for the duration of his imprisonment in the United States is a question of law, and, therefore, is reviewed de novo. *See United States v. Stephens*, 237 F.3d 1031, 1033 (9th Cir.2001). As noted, in determining the scope of damages for Alvarez's ATCA claim, we look to federal law. By contrast, for Alvarez's FTCA claim, "the extent of the United States' liability under the FTCA is generally determined by reference to state law." *Molzof v. United States*, 502 U.S. 301, 305, 112 S.Ct. 711, 116 L.Ed.2d 731 (1992).

Although we have found neither federal nor state law cases that have dealt with the question whether an individual who has been kidnaped and brought to the United States for a criminal prosecution can recover damages for the duration of his imprisonment in the United States, we agree with the district court that "the lawful arrest warrant and indictment broke the chain of causation from [Sosa]'s actions to [Alvarez]'s continuing injuries."

As the district court explained, the rationale of federal cases involving false arrest and imprisonment is useful here despite the uniqueness of the facts. With respect to a § 1983 action based on false arrest, this Court has stated:

> Filing of a criminal complaint immunizes investigating officers such as the appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time.

Smiddy v. Varney, 665 F.2d 261, 266-67 (9th Cir.1981). In Alvarez's case, the DEA had an independent and lawful basis for Alvarez's arrest once he fell within the jurisdiction of the warrant and felony indictment.

Similarly, California courts have cut off liability for false arrest at the date of arraignment, *see County of Los Angeles v. Superior Court*, 78 Cal.App.4th 212, 92 Cal.Rptr.2d 668, 677 n. 4. (2000), but the reasoning for the cut-off differs from that of federal law, and Alvarez contends that it does not apply to this case. In *Asgari v. City of Los Angeles*, 15 Cal.4th 744, 757, 63 Cal.Rptr.2d 842, 937 P.2d 273 (1997), the California Supreme Court held that Government Code § 821.6 precluded a plaintiff in a false arrest action from recovering for injuries attributable to the period of incarceration after his or her arraignment on criminal charges.

According to Alvarez, *Asgari* merely holds that Cal. Gov.Code § 821.6, which provides public employees with immunity from malicious prosecution actions, immunizes public employees from damages for false imprisonment from the time of lawful arraignment on.[4] As Alvarez notes, Sosa is not a public employee under § 821.6, because he is not an employee of a California state entity. *See Randle v. City and County of San Francisco*, 186 Cal.App.3d 449, 456, n. 6, 230 Cal.Rptr. 901, (1986) (noting that "The Government Code defines 'public employee' as 'an employee of a public entity,' (Section 811.4) and 'public entity' as including 'the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.' (Section 811.2)"). Alvarez maintains that the rule of *Gill v. Epstein*, 62 Cal.2d 611, 617-18, 44 Cal.Rptr. 45, 401 P.2d 397 (1965), that imprisonment proximately caused by false arrest, including imprisonment after a lawful arraignment, is compensable as a "natural consequence of a false arrest" has survived *Asgari* and controls his case.

We agree with the district court that *Asgari* overruled *Gill*. The *Asgari* court's discussion of parallels to a New York case based on causation indicates that it meant for its holding to be read broadly. *Asgari* stated that its holding was consistent with *Broughton v. State*. *Broughton's* limitation on liability was based not on state immunity principles, but rather on the grounds that "an action for false imprisonment redresses the violation of plaintiff's freedom of movement and not freedom from unjustifiable litigation, therefore[,] attorney's fees are not proximate after arraignment or indictment and hence not recoverable." *Broughton v. State*, 37 N.Y.2d 451, 373 N.Y.S.2d 87, 335 N.E.2d 310, 316 (1975); *see also County of Los Angeles v. Superior Court*, 78 Cal.App.4th 212, 92

[4] The *Asgari* court also relied on Cal. Gov. Code § 820.4, which immunizes "public employees" from actions based on false arrest.

Cal.Rptr.2d 668, 675 (2000) (explaining that *Asgari* overruled *Gill*). Therefore, we hold that *Asgari* is not limited to public employees. *Asgari* applies here, and Alvarez's damages are limited to his time in Mexico.

Accordingly, we AFFIRM the district court's judgment with respect to Sosa's liability under the ATCA, the substitution of the United States for the individual DEA defendants, the choice of federal common law to determine damages, and the limitation of damages to Alvarez's time in captivity in Mexico. However, we REVERSE the district court's dismissal of Alvarez's FTCA claims against the United States and REMAND the case for a determination of the United States' liability. The dismissal of Alvarez's claims against Garate-Bustamente is GRANTED. No party to recover costs on appeal.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 93-4072 SVW (SHx)

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court conducted a bench trial in this case on May 19 and July 1, 1999. In the interim the Court viewed several hours of excerpts from Plaintiffs deposition and considered the briefs of the parties. After the close of the trial, the Court requested further briefing from the parties regarding damages. The record in this matter is now complete. Based on all of the evidence adduced at trial and in accord with Fed. R. Civ. P. 52(a), the Court now enters its findings of fact and conclusions of law.

I. Findings of Fact

Excerpts of Record

This action arises out of the investigation and prosecution of federal criminal offenses based upon the February 1985 kidnaping, torture and murder of Drug Enforcement Administration ("DEA") Special Agent Enrique Camarena-Salazar ("Camarena") in Guadalajara, Mexico. Numerous individuals were arrested and prosecuted, both in the United States and in Mexico, for the kidnaping, torture and murder of Camarena. *See generally, United States v. Caro-Quintero,* 745 F. Supp.

599, 601-02 (C.D. Cal. 1990), *aff'd,* 946 F. 2d 1466 (9th Cir. 1991), *rev'd,* 504 U.S. 655 (1992).

After being abducted outside the American Consulate in Guadalajara, Mexico, Camarena was tortured and killed at a residence then owned by Rafael Caro-Quintero and located at 881 Lope de Vega, also in Guadalajara. The plaintiff Humberto Alvarez-Machain ("Alvarez" or "plaintiff') admits that he was present at this location during the time that Camarena was being held there. November 18-21, 1998 Deposition of Humberto Alvarez-Machain ("Alvarez Dep.") at 356; Plaintiffs Responses To Defendant United States Requests for Admission ("Plaintiff's Admissions (U.S.)") at ¶ 1.

On January 19, 1990, the Honorable Edward Rafeedie issued a warrant for the arrest of Alvarez on charges of aiding and abetting and kidnaping in violation of 18 U.S.C. §§1201(a)(5) and 2. Exhibit No. 211. None of the information presented to Judge Rafeedie to obtain the abovementioned warrant was provided by defendant Jose Francisco Sosa ("Sosa"). Declaration of Jose Francisco Sosa ("Sosa Dec.") at ¶ 4.

In January 1990, a federal grand jury empaneled in the Central District of California was investigating the circumstances surrounding the kidnaping, torture and murder of Special Agent Camarena. On January 30, 1990, the grand jury returned a Sixth Superseding Indictment ("Indictment") charging Alvarez and others with various federal criminal violations in connection with the kidnaping and murder of Special Agent Camarena and his pilot Alfredo Zavala-Avelar. A bench warrant for the arrest of Alvarez was issued upon the return of the Indictment. Plaintiff's Statement of Genuine Issues of Material Fact in Dispute in Opposition to Defendant Sosa's Motion for Summary Judgment ("Plaintiff's Admissions (Sosa)") at ¶ 4. None of the evidence presented to the

grand jury to obtain the above-mentioned Indictment was provided by Sosa. Sosa Dec. at ¶ 4.

In late 1989 and early 1990, the DEA engaged in discussions with various individuals, including controlled informants and operatives then working for the DEA in the United States and Mexico, regarding an effort to apprehend Alvarez in Mexico and to return him to the United States to answer the criminal charges that had been filed against him. These discussions contemplated that the actual apprehension of Alvarez in Mexico would be carried out for the DEA by Mexican nationals. The DEA headquarters approved the use of Mexican nationals to arrest Alvarez in Mexico and to transport Alvarez to the United States. Plaintiff's Admissions (Sosa) at ¶ 5.

The DEA discussions with Mexican nationals regarding the arrest of Alvarez were conducted for the DEA by, or under the direct supervision of, DEA Special Agent Hector Berrellez ("Berrellez"), the agent in charge of the DEA investigation of the Camarena murder in the Los Angeles Division. In conducting these discussions with the Mexican nationals, Berrellez was assisted by Antonio Garate ("Garate"), a long-time, salaried DEA operative who was a DEA employee at the time of the events in issue here. When Garate pursued his contacts in Mexico to enlist assistance in arresting Alvarez, Garate was acting on behalf of the DEA. Plaintiff's Admissions (Sosa) at ¶¶ 6-7.

One such Mexican national who was contacted by DEA for assistance in arresting Alvarez and bringing him to the United States was Ignacion or "Ignacio" Barragan ("Barragan"). Barragan was then a former Mexican law enforcement officer living in Juarez, Mexico. Garate traveled to Mexico to meet with Barragan and to discuss the plan to arrest Alvarez. Barragan agreed to recruit Mexican nationals to arrest Alvarez on behalf of the DEA. Plaintiff's Admissions (Sosa) at ¶ 8.

Sosa was born in Mexico in June 1947. In April 1990, he was 43 years old, approximately 5 feet 6 inches tall, and of average weight. At that time, Sosa had not held full-time employment for a number of months. Sosa's last full-time employment position, prior to April 1990, was with a branch of the Mexican Federal Police that investigates illegal gaming and lottery activities. Sosa Dec. at ¶ 2.

In or about March 1990, Sosa was contacted by Barragan. Sosa knew that Barragan had previously served as a senior customs official in Juarez, Mexico, and believed that Barragan worked as an agent for the DEA in Mexico. Sosa Dec. at ¶ 3.

Barragan asked Sosa to participate in an operation to arrest Alvarez for the DEA. Sosa did not personally know Alvarez and, prior to his discussions with Barragan, had not previously communicated any information about Alvarez to U.S. law enforcement authorities. Barragan told Sosa that the DEA in Los Angeles had obtained a warrant for the arrest of Alvarez, and that Barragan was organizing a group to arrest Alvarez in Guadalajara, Mexico and to bring him to the United States. Barragan told Sosa that the DEA would pay the expenses of the arrest operation and, if the operation was successful, the DEA would recommend Sosa for a position with the Mexican Attorney General's Office. In his conversations with Sosa, Barragan emphasized the importance to the DEA that Alvarez-Machain not be abused or harmed during the arrest operation. Sosa Dec. at ¶ 4.

Sosa agreed to participate in the arrest of Alvarez in Mexico and to assist in delivering him to the United States. Sosa believed that he was employed with the DEA and would receive DEA direction through Barragan. Barragan instructed Sosa to travel to Guadalajara where others engaged by Barragan were gathered. Barragan provided Sosa with the name and telephone number of the point of contact in Guadalajara who, Sosa understood, was related to Barragan.

Sosa does not recall the name of that individual, and refers to him as Barragan's relative. Sosa believed that Barragan's relative also was working for the DEA. Sosa Dec. at ¶¶ 5, 7.

In late March 1990, Sosa traveled to Guadalajara and there met approximately six individuals—Barragan's relative and four or five others. One of the individuals was a female and the others were males. All were Mexican nationals. Sosa knew only one of these individuals prior to this meeting in Guadalajara, a person who also came from Mexico City named Covarrubias. Sosa Dec. at ¶ 6.

The members of the group that was formed to arrest Alvarez took direction from Barragan (by telephone), and from his relative, regarding a plan to take Alvarez into custody. In these directions, it was emphasized again that Alvarez-Machain must not be harmed during the arrest. The plan was to take Alvarez into custody at his medical office in Guadalajara at the end of the day when there were no patients present. It was a further part of the plan to drive Alvarez from Guadalajara to Leon where the group would transport Alvarez by private plane to the United States. Sosa Dec. at ¶ 7.

On April 2, 1990, at about 7:00 or 8:00 at night, four or five of the men who were members of the arrest group entered the medical office of Alvarez and took him into custody. None of the men were dressed as police officers. Sosa Dec. at ¶ 8. One of the men told Alvarez that there was a warrant for Alvarez' arrest. Alvarez Dep. at 319-320. Alvarez offered no resistance at this time, or at any point while in custody in Mexico. *Id.* at 258. While the men were armed, they did not display their weapons, nor did they carry large machine guns. The Court finds Ana Maria Ibarraran Alvarez's testimony to the contrary entirely incredible as described below. Alvarez was escorted out of the medical office to a waiting car. Alvarez asked if he was being taken to the United States, but no one in the arrest group answered him at

this point. There was a police station within a few blocks of the medical office. Alvarez did not cry out or attempt to draw attention to himself or the arrest group while he was being escorted out of his office to the waiting car. Sosa Dec. at ¶ 8.

At the time of Alvarez' arrest in Guadalajara on April 2, 1990, a warrant for his arrest, issued by a judicial officer of the United States of America, was outstanding. Plaintiff's Admissions (U.S.) at ¶ 17; Alvarez Dep. at 321. Plaintiff does not dispute that the warrant was supported by probable cause.

On the evening of April 2, Alvarez was driven to a house owned by Barragan's relative where he was held in custody for approximately two hours. Sosa was not present for some portions of the time that Alvarez was held at the house. Sosa Dec. at ¶¶ 9-10. Alvarez is unable to identify Sosa as being present at the Guadalajara house at all. Alvarez Dep. at 324, 326, 344-45.

Other than Alvarez' own testimony, which for the reasons explained below the Court finds not credible, there is no evidence that Alvarez was tortured or abused at the house in Guadalajara. Alvarez contends that he received an injection while in the house in Guadalajara, and Sosa subsequently overheard Alvarez and one of the other Mexican nationals speaking about an injection. Sosa Dec. at ¶¶ 10, 16. However, there is no credible evidence that an injection ever occurred. In fact, Alvarez never complained of an injection while in Mexico, Sosa Dec. at ¶ 10, or in El Paso. Meza Dec. at ¶¶ 6, 8-9; Martyak Dec. at ¶¶ 3-4. Alvarez does not contend that he was shocked, injected, or struck at any time after he left the house in Guadalajara on the night of April 2, 1990. Alvarez Dep. at 325-326, 331-32.

Alvarez was driven from Guadalajara to Silao, a small town near the Leon airport, where Alvarez was held in custody at a motel for the rest of the night of April 2, 1990 and part of the next morning. Sosa Dec. at ¶¶ 11-13; Alvarez

Dep. at 334. Once at the motel in Silao, Alvarez laid down on one of the beds and used the bathroom whenever he wanted during the night. Alvarez Dep. at 335. Alvarez was offered and accepted water at the motel. *Id.* Although Alvarez did not eat at the motel, he was not denied food. *Id.* at 337-338.

At about midday on April 3, 1990, Alvarez was taken by taxicab from the Silao motel to the Leon airport. Alvarez Dep. at 338. Alvarez was met at the Leon airport by Barragan's relative and two other members of the arrest team. Sosa Dec. at 1 15. He was escorted through the pubic portion of the airport terminal, through the metal detectors, and out to the runway where a private plane was waiting. *Id.* In addition to the pilot, the plane was occupied by Alvarez, Barragan's relative, Sosa and two other members of the arrest team. The plane departed from Leon in the early afternoon of April 3, 1990. During the flight, Alvarez spoke to Barragan' s relative who said that he was working for the DEA. Alvarez said that he had tried several times to contact the head DEA agent in Guadalajara but had not been successful. Sosa Dec. at ¶ 16.

The plane transporting Alvarez landed in E l Paso later in the afternoon of April 3, 1990. There, Alvarez was delivered to the custody of DEA Special Agent Berrellez and others, including DEA Special Agents Reynaldo Sepulveda, Marty Martinez, and Delbert Salazar, who were waiting on the runway where the plane stopped. Sosa Dec. ¶ 17; Salazar Dec. ¶¶ 5-9; Sepulveda Dec. at ¶¶ 7-8. When Alvarez exited the plane, Agent Berrellez informed him, in the Spanish language, that he was under arrest. Salazar Dec. at ¶ 9. Alvarez indicated that he was glad to be in the United States so that he could clear his name. Salazar Dec. at ¶ 10; Martinez Dec. at ¶ 4. The DEA agents at the airport saw no evidence that Alvarez had been hurt, reported that he walked without a limp, and noted that Alvarez acted pleasant and did not seem upset. Salazar Dec. at ¶¶ 10-11; Martinez Dec. at ¶ 4; Sepulveda Dec. at ¶ 9.

Immigration and Naturalization Service ("INS") Agent Ronnie Ayers was also present to meet the plane at the El Paso airport in order to conduct the INS processing required whenever an alien enters the United States. Ayers Dec. at ¶ 6. Soon after Alvarez stepped off the plane, Ayers interviewed him on the tarmac in the Spanish language, obtaining required biographical information. *Id.* at ¶ 11. During this conversation, Alvarez was polite and accommodating, did not appear emotionally upset, and neither voiced any complaints regarding his treatment while in the custody of the arrest team nor requested food, water, or any other assistance. *Id.* Alvarez did not appear to Agent Ayers to be disheveled or abused in any way; his gait was normal and no bruises or cuts were visible on the exposed areas of his skin. *Id.* at ¶ 10.

The group who had delivered Alvarez from Mexico to El Paso, including Sosa, was required to return immediately to Mexico, and the plane carrying the group departed only a few minutes after it had landed. Sosa Dec. at ¶ 17. Sosa was not present in El Paso at any time during the events occurring during plaintiffs interrogation and confinement there during the period April 3, 1990 through April 10, 1990. *Id.* From the time that Alvarez was taken into custody at his medical offices in Guadalajara on the night of April 2, 1990, until he was delivered into the custody of Berrellez and the other officials at the El Paso airport, less than twenty-four hours had elapsed. *Id.;* Plaintiffs Admissions (Sosa) at ¶ 27.

Shortly after arrival at the El Paso airport Alvarez was transported to the El Paso DEA offices by car. Salazar Dec. at ¶ 12. Once there, Alvarez was placed in an interview room, and read his *Miranda* rights in the Spanish language. Sepulveda Dec. at ¶ 10; Salazar Dec. at ¶ 13; Martinez Dec. at ¶ 5. Alvarez indicated that he understood each of the rights as they has been explained to him. Sepulveda Dec. at ¶¶ 10, 14. Agent Berrellez then informed Alvarez that the DEA agents wanted to ask him some questions about the Camarena

kidnaping. *Id.* at ¶ 11. The interview was not confrontational, and throughout his interview at the DEA offices, Alvarez emphasized his willingness to cooperate. *Id.*; Salazar Dec. at ¶ 13; Martinez Dec. at ¶ 5; Sullivan Dec. at ¶ 5. Alvarez never reported to the agents that he had been tortured or mistreated while he was being brought from Mexico to the United States. Martinez Dec. at ¶ 6; Salazar Dec. at ¶¶ 11-13.

While at the DEA offices, Alvarez was photographed from head-to-toe to document that he had not been mistreated or tortured. Sepulveda Dec. at ¶ 13. Alvarez displayed no resistance to this process. *Id.* Agent Sullivan, who actually took the photographs, saw no cuts, scrapes, scratches, bruises, handcuff marks, or other signs that Alvarez had been injured, abused, or mistreated in any way. Sullivan Dec. at ¶ 7. Further, the developed photographs show no evidence of any external injuries. Exhibit No. 208.

Alvarez was transported to the El Paso County Jail on the night of April 3, 1990 for overnight detention. Sepulveda Dec. at ¶ 15. Agent Martinez and another agent from the DEA's El Paso office drove Alvarez to the El Paso County jail. stopping on the way to buy two hamburgers because Alvarez indicated that he was hungry. Martinez Dec. at ¶ 7. Alvarez was turned over to the custody of officers at the El Paso County jail, where he was booked and signed in under his own name. *Id.* at ¶ 9.

On the night of April 3, 1990, Alvarez was held in the El Paso County jail pending arraignment by the federal court in El Paso. The following morning, Alvarez complained of chest pains and was taken from the El Paso County jail, by ambulance, and admitted to Thomason General Hospital in El Paso. Alvarez Dep. at 290-291.

Alvarez was a patient at Thomason General Hospital from April 4 to April 6, 1990. Meza Dec. at ¶¶ 6-7. During that time he was examined and attended to by doctors and nurses

who communicated with Alvarez in the Spanish language. Alvarez Dep. at 292, 294-295. Alvarez was able to communicate with the Thomason medical staff whenever he needed medication or to report a particular pain or problem. *Id.* at 300. Dr. Armando Meza was one of the physicians who examined and treated Alvarez, and who spoke to Alvarez in the Spanish language. Meza Dec. at ¶¶ 5-6. Dr. Meza impressed Alvarez with his skill and knowledge. Alvarez Dep. at 297. Alvarez never reported to anyone at Thomason General Hospital that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. Alvarez Dep. at 287, 309.

On April 5, 1990, at 4:30 p.m., federal district judge Emilio M. Garza commenced an arraignment hearing, with the assistance of a Spanish language interpreter, at Alvarez' bedside at Thomason General Hospital. April 5, 1990 Hearing Transcript ("Hr'g. Tr."), Exhibit No. 230. After the reading of the Indictment had begun, and Judge Garza had entered a plea of "not guilty" on all counts of the Indictment, the hearing was adjourned when Alvarez reported that he was feeling too ill to proceed with the hearing. *Id.* Alvarez never reported during this April 5 hearing that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. *Id.*; Alvarez Dep. at 287, 309.

On April 6, 1990, Alvarez was released from Thomason General Hospital and transferred to the infirmary at La Tuna Federal Corrections Institute ("La Tuna") in El Paso. Alvarez Dep. at 302. Alvarez was a patient at the La Tuna infirmary from April 6 to April 10, 1990. Martyak Dec. at ¶¶ 3-4. During that time he was examined and attended to by doctors and nurses, including Dr. Thomas Martyak. *Id.* The La Tuna medical personnel communicated with Alvarez in the Spanish language. *Id.*; Hubble Dec. at ¶¶ 5-6. Alvarez never reported to anyone at La Tuna that he had been shocked, injected or

abused during and following his arrest in Guadalajara on April 2, 1990. Martyak Dec. at ¶¶ 3-4; Alvarez Dep. at 287, 309.

On April 9, 1990, at the La Tuna infirmary, federal district judge Emilio M. Garza presided over the reading of the Indictment, the acceptance of Alvarez' plea of not guilty, and a hearing that established the identity of the accused as the Humberto Alvarez-Machain named in the Indictment. April 9, 1990 Hr'g. Tr., Exhibit No. 231; Alvarez Dep. at 306-309. Alvarez never reported during this April 9 hearing that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. Alvarez Dep. at 287, 307-309.

Alvarez was transported by United States Marshals from El Paso to Los Angeles where he appeared before Judge Rafeedie on April 10, 1990. At that time the Court conducted a detention hearing and entered an order that Alvarez be held without bond pending trial. April 10, 1990 Hr'g. Tr., Exhibit No. 232. During the April 10 hearing, Alvarez addressed Judge Rafeedie, but Alvarez did not report during that hearing that he had been shocked, injected or abused during and following his arrest in Guadalajara on April 2, 1990. *Id.* at 19.

On April 19, 1990, Alvarez appeared again before Judge Rafeedie. On this occasion, the Court conducted a motions hearing which also was attended by co-defendant Juan Matta-Ballesteros. Alvarez Dep. at 313-317. During this hearing, Alvarez concedes that he may have heard Matta-Ballesteros' claim that he had been mistreated, and shocked with an electrical device, when he was brought to the United States. *Id.* at 316-317. It has previously been found that Alvarez was, in fact, present in the courtroom when Matta-Ballesteros made these claims of mistreatment. October 19, 1992 Hr'g. Tr., Exhibit No. 233.

On May 25, 1990 Judge Rafeedie conducted an evidentiary hearing on Alvarez' motion to dismiss the Indictment for outrageous government conduct and for lack of personal jurisdiction on the ground that the manner in which his presence was secured allegedly violated the extradition treaty between the United States and Mexico. At that hearing, Judge Rafeedie heard testimony from a number of witnesses, including Alvarez. Alvarez testified regarding the torture and abuse to which he was allegedly subjected when taken into custody in Mexico. On August 10, 1990, Judge Rafeedie entered an Order which rejected Alvarez' clams of torture and abuse as "not worthy of belief" and "simply not credible." *United States v. Caro-Quintero,* 745 F. Supp. at 605-06. During a later proceeding in the case Judge Rafeedie, referring to the basis for his August 10, 1990 ruling, described Alvarez' allegations of mistreatment as completely contrived and adoptive of similar allegations that had been made by co-defendant Matta-Ballesteros. October 19, 1992 Hr'g. Tr., Exhibit No. 233. The August 10, 1990 Order, however, did direct that Alvarez be returned to Mexico on the ground that the seizure of Alvarez in Mexico violated the U.S.-Mexico extradition treaty. *Caro-Quintero,* 795 F. Supp at 614.

On the appeal of the United States, the Order of the district court dismissing the Indictment was affirmed by the Ninth Circuit. *United States v. Alvarez-Machain,* 946 F. 2d 1466 (9th Cir. 1991). However, the Supreme Court granted the government's petition for certiorari and reversed. The Court held that the arrest of Alvarez by Mexican nationals acting on behalf of U.S. law enforcement officials did not violate the U.S.-Mexico Extradition Treaty, and did not deprive the district court of jurisdiction. *United States v. Alvarez-Machain,* 504 U.S. 655 (1992).

On remand from the Supreme Court, Alvarez renewed his allegations of torture and abuse in applying to the Ninth Circuit to dismiss the Indictment on grounds of outrageous

and shocking government conduct. The Ninth Circuit denied Alvarez' application, holding that the findings of the district court-that the allegations of torture and abuse were not credible-precluded the claim that the circumstances of Alvarez' "kidnaping" were outrageous or shocking. *United States v. Alvarez-Machain*, 971 F.2d 310, 311 (9th Cir. 1992).

The trial of Alvarez and his co-defendant Ruben Zuno Arce commenced on December 1, 1992. On December 14, 1992, following the presentation of the government's case, Judge Rafeedie dismissed all charges pending against Alvarez pursuant to Fed.R.Crim.P. 29(a) and ordered Alvarez discharged from custody the following day.

Findings

The Court finds that the record evidence set forth above is credible and reliable, and the Court hereby adopts this evidence as its findings of fact as if fully set forth herein.

Alvarez recalls who Sosa is and that Sosa testified at a pretrial hearing in Alvarez' criminal case. Alvarez Dep. at 344. Alvarez is unable to identify Sosa as one of the individuals who, Alvarez alleges, shocked and injected Alvarez, pointed a gun at or otherwise assaulted Alvarez, or threatened him. *Id.* at 344-345. Alvarez is unable to identify Sosa even as someone who may have touched Alvarez gently on any part of his person during the time that Alvarez was in custody in Mexico in April 1990. *Id.* at 345.

There is no credible evidence that Sosa ever pointed a gun at Alvarez, struck or applied force of any kind to Alvarez, threatened Alvarez, or questioned or interrogated Alvarez about his involvement in the Camarena murder or in any other wrongdoing. There is no credible evidence that Sosa ever applied an electric shock apparatus to Alvarez, or injected him, or that anyone else mistreated or threatened Alvarez. There is no evidence in the record that Sosa, or any of the other members of the arrest team in Mexico, ever

interrogated plaintiff, or even mentioned the Camarena matter, during the time that plaintiff was in their custody in Mexico.

The Court did not find plaintiff to be a credible witness. Plaintiff declined to appear personally to testify, and presented his version of events through videotaped deposition testimony. Plaintiff's demeanor, as observed by the Court via the videotaped deposition, simply was not credible.[1]

That plaintiff is not a believable witness was confirmed by the numerous instances that plaintiff lied during his deposition, including lies-later admitted by Alvarez-regarding the absence of any marital problems, Alvarez Dep. at 186-87; the duration of his separation from his wife, *id.* at 194-95; the reason why his wife was living in the United States, *id.* at 361-62; his knowledge of his wife's statements to the press regarding plaintiff's relations with narco-traffickers and the Alvarez' marital problems, *id.* at 362, 368-69; the passage of time since his wife's last visit to the United States, *id.* at 369-70; and plaintiffs knowledge of cocaine possession by Caro-Quintero or other evidence of his narco-trafficking activities. *Id.* at 394-96. Plaintiff also has attempted to mislead the Court in sworn declarations he has submitted. In a sworn declaration, Plaintiff claimed he did not report the alleged torture by his captors to the staff at La Tuna because none of the medical personnel there spoke Spanish. September 18,

[1] The Court can and does take into account plaintiff's failure to testify in person at trial in determining the weight to give plaintiff's testimony. *Glaverbel Societe Anonyme v. Northlake Marketing and Supply, Inc.*, 139 F.R.D. 368, 370 (N.D. Ind. 1991). Discounting plaintiff's version of events because of his failure to testify in person at trial is particularly appropriate, given his admitted belief that he could testify falsely outside the United States and not be subject to punishment for such false testimony. Alverez Dep. at 391-92. Although the Court could consider this evidence in discounting Plaintiff's testimony, the Court does not rely on this as a basis for rejecting Plaintiff's testimony. Rather Plaintiff's unconvincing deposition testimony caused the Court to disbelieve Plaintiff.

1992 Alvarez Dec., Exhibit No. 237 at ¶ 33. In fact, Dr. Martyak spoke to plaintiff at La Tuna through a Spanish language interpreter, Martyak Dec. at ¶ 3, and numerous members of the La Tuna staff at the time were bilingual. Hubble Dec. at ¶¶ 5-6.

The Court does not believe plaintiffs testimony regarding his allegations of mistreatment. As explained above, the Court generally found plaintiffs testimony unworthy of belief. The Court finds plaintiffs testimony incredible even without considering the other impeaching factors discussed above.

In addition, plaintiffs testimony was contradicted by other evidence and, in many instances, was inconsistent with common sense and human experience. For example, plaintiffs testimony that one of his captors pointed a gun at plaintiffs head in his medical office, Alvarez Dep. at 541, is not credible for a variety of reasons. Plaintiff has conceded that he offered no resistance when the men directed that he go with them, *see* ¶ 14 above, and there is evidence of record that a police station was located nearby plaintiffs medical office. *Id.* The use of a weapon in these circumstances would not be necessary or logical. Moreover, even plaintiffs niece, whose declaration conflicts with plaintiffs in other material respects, does not corroborate plaintiff's claim that one of the men put a gun to plaintiffs head when they took him into custody. Ibarraran Alvarez Dec. at p. 2. As mentioned above, the Court finds Ms. Ibarraran Alvarez's testimony entirely incredible and disbelieves her testimony that the men carried large weapons, brandished weapons in plaintiffs office, or carried large weapons with them into the street.

The Court also rejects plaintiffs testimony that he was punched in the stomach by Covarrubias while exiting the car outside the house to which plaintiff was taken in Guadalajara, Alvarez Dep. at 331, 544. Again, Plaintiff has conceded that he offered no resistance at any time that he was

in the custody of the men who seized him, *see* ¶ 14 above, and thus the use of such force against plaintiff would have been unnecessary. Moreover, it would have been illogical for members of the arrest team to assault plaintiff in public and thereby risk calling attention to the arrest operation.

The Court also rejects plaintiff's testimony that he was shocked with an electrical device and injected while in the house in Guadalajara, or anywhere else in Mexico. First, plaintiff cannot identify any motive for such gratuitous violence in circumstances where he never resisted his captors, *see* ¶ 14 above, and was never interrogated by them. Indeed, it is counter-intuitive that Alvarez would have been subjected to such mistreatment where the Mexican nationals had received specific instructions not to harm Alvarez, and the reimbursement of their expense and any potential reward would be dependent upon compliance with those instructions. Second, there is no physical evidence of abuse to corroborate plaintiff's claim. Rather, the consistent and credible testimony of multiple witnesses who observed Alvarez upon his arrival in El Paso is that his appearance and demeanor were inconsistent with the kind of abuse Alvarez has alleged. Third, plaintiff made no report of abuse or mistreatment when he sought and received medical treatment in El Paso. Fourth, plaintiff never claimed that he was abused until well after he arrived in Los Angeles, and after he had the opportunity to hear such claims of mistreatment being advanced by a co-defendant. Fifth, the Court finds plaintiff incredible as a witness based on its perception of plaintiff's deposition testimony.

In considering these particular allegations, the Court credits the testimony of Dr. Armando Meza that he examined plaintiff carefully at Thomason General Hospital shortly after plaintiff's arrival in El Paso, found no evidence of abuse, and received no report from the patient that any such abuse had occurred. Meza Dec. at ¶¶ 5-10. Moreover, Dr. Meza's

testimony that he spoke to plaintiff in his native language, and that many members of the hospital staff who administered to plaintiff also were bilingual, shows that plaintiff had ample opportunity to report to his caretakers any abuse or injury he had incurred. *Id.* Indeed, plaintiff even admitted he was impressed with Dr. Meza's skill and knowledge. Alvarez Dep. at 297. Thus, there was no legitimate reason for plaintiff not to confide in Dr. Meza. The Court also credits the testimony of Dr. Thomas Martyak and Physician's Assistant Kenton Hubble regarding the treatment of plaintiff at La Tuna infirmary from April 6-10, 1990. Martyak Dec. at ¶¶ 3-4; Hubble Dec. at ¶¶ 3-6. This testimony also demonstrates the absence of any physical evidence of abuse, and shows the ample opportunity plaintiff had to report any alleged abuse to his bilingual caregivers.

The Court also believes it is significant that plaintiff made no report about the alleged abuse to *anyone*, including his own lawyers, until well after his arrival in Los Angeles. Plaintiff was represented by counsel, including a Spanish-speaking attorney, at his arraignment in El Paso. April 9, 1990 Hr'g. Tr., Exhibit No. 231. Plaintiff also spoke with his appointed counsel prior to his initial hearing in Los Angeles. April 10, 1990 Hr'g. Tr., Exhibit No. 232. Indeed, plaintiff even addressed the Court directly during that initial appearance. *Id.* at 19. Yet, plaintiff concedes, it may have been as long as several weeks after his arrival in Los Angeles that he first told his own lawyer about the alleged abuse in Mexico. Alvarez Dep. at 309, 313-14. By this time, of course, plaintiff would have become aware of the allegations of mistreatment being made by his co-defendant Matta-Ballesteros. October 19, 1992 Hr'g. Tr. at 60, Exhibit No. 233; Alvarez Dep. at 315-17. Even plaintiff acknowledges that his initial report to his lawyer of the alleged abuse in Mexico may not have been made until after plaintiff had learned of his co-defendant's allegations of abuse. Alvarez Dep. at 313. In these circumstances, the Court finds that

plaintiff's allegations of mistreatment are adoptive of the allegations made by Matta-Ballesteros, and are completely contrived.

II. Conclusions of Law

The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1350. Plaintiff only had four claims remaining at the time of trial: (1) kidnapping, (4) arbitrary detention, (6) assault and battery, and (8) intentional infliction of emotional distress. The Court previously granted summary judgment in Plaintiff's favor on the kidnapping and arbitrary detention claims. *See* March 18, 1999 and May 18, 1999 Order. Accordingly, the Court need only resolve the issue of damages on those claims.

For the reasons outlined above, the Court FINDS for Defendant Sosa on Plaintiff's sixth cause of action for assault and battery. The Court FINDS that Plaintiff did not suffer any assault or battery from the time of his in seizure in his office in Guadalajara until his delivery to United States officials in El Paso.[2].

In addition, the Court FINDS for Defendant Sosa on Plaintiff's eighth cause of action for intentional infliction of emotional distress. The Court rejects Plaintiff s claims of abuse in Mexico, and the Court previously concluded that California law would immunize Defendant for the emotional distress based on the arrest itself. *See* March 19, 1999 Order. As discussed in note two, Plaintiff will already recover for the

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[2] As the Court noted in its March 18, 1999 Order at note 39, the Court concludes that the simple amount of force to effectuate the arrest does not establish liability for assault and battery. In addition, as with Plaintiffs eighth claim below, Plaintiff will recover for the entirety of the conduct involved in his kidnapping through damages based on his first and fourth claims.

kidnapping and detention, including a fuller panoply of potential damages, through his Alien Tort Claims Act causes of action.[3]

The Court must now turn to a discussion of the proper damages under the Alien Tort Claims Act. The Court has two major areas to discuss in fashioning a remedy. First, as the Court announced at the beginning of the trial in this matter, Defendant Sosa only faces liability for the period from Plaintiff's kidnapping in Mexico until Defendant and others delivered Plaintiff to the authorities in the United States. Second, the Court must determine what law of damages to apply to that period and establish the proper amount of compensatory and, if applicable, punitive damages.

A. Defendant Sosa's Liability Stopped at the U.S. Border

After the Court granted summary judgment in Plaintiff's favor with respect to the kidnapping and arbitrary detention claims, the parties each briefed the issue of the scope of damages. Plaintiff claimed that Defendant Sosa's actions led to Plaintiff's detention in the United States for a significant period of time and that Plaintiff should receive a damage award which covers the entire period. Defendant countered that damages should cease at the time Defendant turned Plaintiff over to United States authorities in El Paso because at that point the actions of domestic law enforcement broke the chain of causation and created an independent basis for Plaintiff's detention. At the start of the Court trial on May 19, 1999, the Court announced its agreement with Defendant's view and limited damages to the point at which domestic law enforcement took Plaintiff into custody.

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[3] In fact, Plaintiffs post trial damages brief does not even pursue his common law claims (six and eight). *See* Plaintiff's Supplemental Trial Memorandum Re Measure of Damages (seeking damages only under the Alien Tort Claims Act).

The facts of this case raise troubling questions in attempting to fashion a remedy. The parties analyze the issue by examining false imprisonment cases. The Court agrees that those cases provide some insight into the scope of damages. However, two unique factors of this case limit the utility of the false imprisonment model-and these two factors lead in opposite directions.

On the one hand, Defendant Sosa cannot argue that Plaintiff's imprisonment and trial in the United States were unforeseeable. There were, in fact, the clearly foreseeable results of his actions. Defendant Sosa knew that United States authorities would arrest, indict, and attempt to try Plaintiff upon Plaintiff's arrival in this country because that was the very reason that the United States hired Sosa in the first place.

On the other hand, none of Defendant Sosa's actions served as a basis for Plaintiffs detention and subsequent trial. In the traditional false arrest case, the defendant misleads the police or the prosecuting attorney and thereby causes an improper arrest and prosecution. By contrast, Defendant Sosa did not provide information which led to Plaintiffs arrest. Instead, domestic authorities had already obtained a valid indictment and arrest warrant at the time of Plaintiffs arrival.

Together, these facts present an very anomalous situation: the government could not have arrested and tried Plaintiff without Sosa's assistance in bringing Plaintiff to the United States, but the United States would have arrested Plaintiff as soon as he arrived in the country regardless of who brought him here or what that individual told the authorities.

The Court agrees with Defendant that, in this situation, the lawful arrest warrant and indictment broke the chain of causation from Defendant's actions to Plaintiffs continuing injuries. Federal cases dealing with false arrest and imprison-

ment establish this principle. In an early case, the Ninth Circuit explained that

> Filing of a criminal complaint immunizes investigating officers such as the appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time. This presumption may be rebutted, however. For example, a showing that the district attorney was pressured or caused by the investigating officers to act contrary to his independent judgment will rebut the presumption and remove the immunity. Also the presentation by the officers to the district attorney of information known by them to be false will rebut the presumption. These examples are not intended to be exclusive. Perhaps the presumption may be rebutted in other ways.
>
> . . . Authorities from other circuits lend some support for this position. Thus it has been held that the filing of charges under certain circumstances does break the chain of causation between an arrest and prosecution.

Smiddy v. Varney, 665 F.2d 261, 266-67 (9th Cir. 1981) ("*Smiddy I*") (citations omitted). The Eleventh Circuit focused on this causation analysis in *Barts v. Joyner*, 865 F.2d 1187 (1989). In *Barts*, the court commented that "[w]e reject plaintiff's contention that she is entitled to damages for her criminal trials, conviction, incarceration, and the resulting aggravation of her Rape Trauma Syndrome. The intervening acts of the prosecutor, grand jury, judge and jury-assuming that these court officials acted without malice that caused them to abuse their powers—each break the chain of causation unless plaintiff can show that these intervening acts were the result of deception or undue pressure by the defendant policemen." *Id.* at 1195.

A number of other courts have reached this result. *See Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996) (finding that indictment broke the chain of causation from actions of detectives); *Ames v. United States*, 600 F.2d 183, 185 (8th Cir. 1979) (holding that grand jury indictment breaks chain of causation); *Dellums v. Powell*, 566 F.2d 167, 192 (D.C. Cir. 1977) (noting that independent prosecutorial decision breaks chain of causation); *Rodriquez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc) (explaining that decision of magistrate or grand jury breaks causal chain); *Dabbs v. State*, 59 N.Y.2d 213, 218 (1983) (holding that damages for false imprisonment cease at arraignment); *Barnes v. District of Columbia*, 452 A.2d 1198 (D.C. 1982) (disallowing a claim for attorney's fees from defending the underlying action in a suit for false arrest and imprisonment).

The most recent California Supreme Court case on the subject appears to reach a similar conclusion. *Asgari v. City of Los Angeles*, 63 Cal.Rptr.2d 842 (Cal. 1997). Asgari, a former Iranian wrestler, defected to the United States. Before the Olympic trials, in which he had a significant chance of succeeding, the police arrested him for possession for sale of one pound of heroin. Ultimately, Asgari won an acquittal; nevertheless, he spent seven months and six days in jail and missed the Olympic trials. After his acquittal, Asgari sued for false imprisonment and obtained a verdict of over one million dollars. The *Asgari* court explained that

> Plaintiff contends that his false imprisonment "continued from the date of his arrest to the date of his release from prison" more than seven months later. That is incorrect. Plaintiff's false imprisonment ended when he was arraigned in municipal court on the felony complaint seven days after he was arrested. At that point, plaintiff s confinement was pursuant to lawful process and no longer constituted false imprisonment.

Id. at 850.

Reese v. Geneva Enterprises, 1997 WL 214864 (D.D.C.), used the same causation analysis in a situation conceptually similar to the one at bar. In *Reese*, the government suspected that automobile dealerships in the Washington, D.C., area had assisted drug dealers in laundering money. A sting operation led to the prosecution of several of the employees of the Geneva Enterprises dealership. One employee, after obtaining his acquittal, sued Geneva because he felt that "Geneva believed that the undercover officer was a drug dealer, but nonetheless referred the officer to him as legitimate customer without warning him." *Id.* at *1. The *Reese* court held that Reese could not establish proximate causation between Geneva's conduct and the damages Reese suffered from his prosecution. The court, citing *Dellums*, explained that "the grand jury's indictment of Reese was an independent event which broke any causal connection between Geneva's actions and Reese's injury. Thus, Reese is unable to demonstrate, as he must, that Geneva's actions proximately caused his injury." *Id.* at *8.

The *Reese* court added:

> Reese argues that Geneva's conduct was the "but for" cause of his damages: "without Geneva's conduct, no indictment of Reese would ever have taken place." However "but for" causation is only one element of the proximate cause which must be shown to hold a defendant liable for injuries caused by his conduct. The proximate cause of an injury "is one which, in its natural and continual sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred."

Id. at * 8 (citations omitted).

Plaintiff resists these cases on two grounds. First, he claims that the cases almost always involve law enforcement officers and thus the decisions really rely on immunity, not causation.

Second, Plaintiff offers other false imprisonment cases in which plaintiffs recovered damages for the entire length oftheir detention. The Court will deal with these arguments in turn.

Plaintiff is correct that many of the cases cited above rely on the idea of official immunity for police officers. In *Asgari*, for example, the Court explicitly dealt with statutory immunity and the broader language cited above might represent mere dicta. However, in the relevant footnote in the opinion, the *Asgari* Court cited a New York case, *Broughton v. State*, 37 N.Y.2d 451, 459 (N.Y. 1975), which does not rely on the concept of immunity at all. This suggests that the California Supreme Court would apply the *Asgari* rationale more broadly. Similarly, in *Smiddy I*, the Ninth Circuit explicitly mentioned the need to protect police officers. Nevertheless, the court used the language of causation, not solely immunity, to explain its result.

Plaintiff fails to account for the other cases discussed above. While some cases such as *Smiddy I* and *Asgari* do include discussions of immunity, other cases explicitly rely on the lack of causation. In *Barts*, for example, one section of the Eleventh Circuit's opinion dealt with immunity. In a later section, entitled "Damages," the court held that damages ceased at the point of an independent decision of a prosecutor or grand jury. In *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), the court discussed the concept of immunity and causation together:

> "a man [is] responsible for the natural consequences of his actions." This principle led the Supreme Court in *Malley v. Briggs*, to hold that the issuance of an arrest warrant will not shield the police officer who applied for the warrant from liability for false arrest if "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." The

> Court was speaking of immunity but its discussion is equally relevant to causation, as indeed is implied in a footnote to the Court's opinion.

Id. at 993-94 (citations omitted). The Court concludes that persuasive authority exists for the proposition that the independent act of charging authorities breaks the chain of causation such that damages cease to accrue with respect to the individual who made or caused the arrest.[44]

Plaintiff's citation to other cases does not convince the Court that Plaintiff should recover from Defendant Sosa for Plaintiff's entire detention. Plaintiff offers a number of older state cases in which courts allowed recovery for damages for the entire period of detention. In some of those cases the actions of the defendants led to a period of incarceration before any sort of independent hearing. *See, e.g., Collins v. Jones*, 131 Cal.App. 747, 753 (1933) (observing "no showing nor is there a claim made that any person had the right or authority to release plaintiff before a hearing after she was once detained by order of the defendant"); *Kenyon v. Hartford Accident & Indem. Co.*, 86 Cal.App. 269, 273 (1927). In those situations, the Court agrees that a plaintiff should recover for the length of detention, and other damages which arise during that detention, because no independent decision broke the causal chain. However, to the extent that Plaintiff offers any case which suggests recovery for a period of time after the independent decision of a prosecutor or grand jury, the Court follows the number of more recent and better reasoned federal cases on this point.

Plaintiff's case presents a truly unique situation. The Court does not condone Defendant Sosa's actions which the Court has already found to have violated international law. Nevertheless, the Court cannot conclude that Plaintiff can recover

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[4] In this case, that decision occurred, as reflected in the indictment and arrest warrant, before Plaintiff's kidnapping in Mexico.

damages against Sosa for Plaintiff's entire detention in the United States. As the Court noted at the outset, Defendant Sosa took no action which caused Plaintiffs arrest. In the typical false arrest case, a police officer arrests an individual without probable cause or a private citizen provides false or misleading information to the police which causes an arrest. This case stands one step removed from that situation because domestic law enforcement officers performed a lawful arrest based on a valid warrant and indictment. Defendant Sosa certainly made the arrest possible by bringing Plaintiff to the United States, but the arrest and detention occurred for entirely independently, and lawful, reasons.

The Court also notes that Plaintiffs view of the law creates the potential for highly inequitable results. Under Plaintiffs analysis, had Plaintiff been convicted and sentenced to a long term of incarceration, perhaps even a life sentence, Plaintiff would recover damages from Defendant Sosa for each day Plaintiff served pursuant to a validly imposed sentence.

For all of the reasons outlined above, and as described at the May 19, 1999, trial, the Court LIMITS the scope of Plaintiffs damages to the events up to the point at which United States authorities took Plaintiff into custody in El Paso pursuant to a valid warrant and indictment.

B. Establishing a Proper Amount of Damages

Defendant Sosa concedes, as he must, that he faces liability for kidnapping and arbitrary detention in violation of international law under the Alien Tort Claims Act. *See* March 18, 1999 and May 18, 1999 Orders. Instead, Defendant Sosa argues that Mexican law should govern the damages measure in this case because the events occurred in Mexico. Defendant Sosa also claims that if the Court does not apply Mexican law, it should at least reject the imposition of punitive damages under the Alien Tort Claims Act for a variety of reasons. Plaintiff concedes that Mexican law would apply in a

case not brought under the Alien Tort Claims Act and that such law would drastically limit the available damages. *See* Plaintiff's Supplemental Trial Memorandum Re Measure of Damages at 1 n.l. Thus the Court must initially determine what law to apply and then consider the appropriate damage measure.

The Eleventh Circuit has explained that "the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law. Congress, of course, may enact a statute that confers on the federal courts jurisdiction over a particular class of cases while delegating to the courts the task of fashioning remedies that give effect to the federal policies underlying the statute." *Abebe-Jira v. Negewo*, 72 F.3 d 844, 848 (11th Cir. 1996) (citations omitted). *See also Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984) *(Filartiga II)*.

The Court declines to apply the Mexican law of damages to this action. While the events at issue took place in Mexico between, for purposes of this stage of the suit, two Mexican citizens, the Court finds that the application of Mexican law would "inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States." *Filartiga II*, 577 F. Supp. at 864. Judge Nickerson considered exactly this situation on remand from the Second Circuit after that court's landmark decision in *Filartiga*, 630 F.2d 876 (2d Cir. 1980). In *Filartiga II*, Judge Nickerson first looked to Paraguayan law to determine a remedy and concluded that Paraguayan law, with its damages limitations, did not provide an appropriate measure of damages. 577 F. Supp. at 864. Earlier in the opinion, Judge Nickerson commented that "there is no basis for adopting a narrow interpretation of Section 1350 inviting frustration of

the purposes of international law by individual states that enact immunities for government personnel or other such exemptions or limitations." *Id.* at 863.

The Court finds the same analysis relevant in this case: Mexican law would cap the amount of damages and prevent the consideration of punitive damages. Defendant Sosa's position would hold that even if Defendant had held Plaintiff for a period of ten years, Plaintiff could recover no more than fifty or one hundred thousand pesos. The Court concludes that the use of federal common law remedies, including the possibility of punitive damages, best serves the ends of the Alien Tort Claims Act. The Court's reading also follows the limited case law on this subject: courts routinely apply federal common law and consider punitive damages in section 1350 suits. *See e.g., Abebe-Jira*, 72 F.3d at 848; *Paul v. Avril*, 901 F. Supp. 330 (S. D. Fla. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 198 (D. Mass. 1995).[5]

The Court must now determine an appropriate amount of compensatory damages and evaluate whether or not to impose punitive damages.

Compensatory Damages

Plaintiff seeks $150,000 in compensatory damages and cites several cases from section 1983 litigation to suggest the propriety of such an amount. Defendant counters that the amounts in the cases cited by Plaintiff relied on significantly greater showings of emotional distress. As discussed in the

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[5] Defendant Sosa points out that the Ninth Circuit allowed the application of the damages law of the Philippines in *Hilao v. Estate of Marcos*, 103 F.3d 767, 780 (9th Cir. 1996). However, the Ninth Circuit did not squarely address the question of the appropriate law to apply in that case. In addition, this Court's conclusion comports with the Ninth Circuit's action in *Marcos:* there, Philippine law allowed exemplary damages, and its application did not frustrate the remedial purposes of the Alien Tort Claims Act.

findings of fact, the Court concluded that Plaintiff did not experience any mistreatment during his approximately twenty hours in custody in Mexico and Plaintiff provides little evidence about his emotional distress.[66] Plaintiff knew, relatively quickly after his seizure, that his captors were transporting him to the United States. However, the fact remains that Defendant seized Plaintiff in Mexico and held him for a period of twenty hours. Despite the fact that Plaintiff failed to adduce any tangible proof of emotional distress, the Court does not doubt that a kidnapping would produce such distress. Accordingly, the Court, based on the evidence in this case, AWARDS Plaintiff compensatory damages in the amount of $25,000.

Punitive Damages

Defendant Sosa contends that even if punitive damages are available under the Alien Tort Claims Act for kidnapping and arbitrary detention, the Court should not impose such damages in this case. Defendant makes two arguments. First, Defendant argues that the Court should not impose punitive damages because the issue of Plaintiff's claims under the Alien Tort Claims Act presented one of first impression. Second, under federal and California law, Defendant claims that Plaintiff must prove that: (1) Defendant's conduct was sufficient to support a punitive sanction; (2) the sanction would deter Defendant, especially in light of Defendant's financial condition; and (3) the punitive damages bear a reasonable relationship to the injury actually suffered. Plaintiff counters that Defendant knew that his conduct violated the law and that Defendant did so for personal gain.

The Court agrees with Defendant's position and declines to impose punitive damages even though the Court recognizes

[6] As noted previously, Plaintiff has waived all of his claims for damages, such as economic, except for his emotional distress from the events at issue.

its ability to do so. As an initial matter, the Court agrees with Defendant that punitive damages are not appropriate in this case of first impression. As the Court previously noted, no United States court has ever recognized kidnapping as a cognizable claim under the Alien Tort Claims Act and only a few courts have considered arbitrary detention claims under very different circumstances. The Ninth Circuit and California courts have decided that punitive damage awards are inappropriate when the case involves an issue of first impression or a newly established right. *See, e.g., Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1104 (9th Cir. 1992).

This Court's previous Order recognizing a consensus in international law against kidnapping and transborder abduction, *see* March 18, 1999 Order, does not counsel a different result. International law does clearly prohibit transborder abductions. However, Defendant Sosa believed that his actions were valid under United States law, even if he knew that his actions were impermissible in Mexico. Plaintiff did not provide any evidence of Defendant's knowledge of international law on this point. Because of the unsettled state of the law, Defendant Sosa did not have a clear warning of the impropriety of his conduct. For this reason, Plaintiff cannot demonstrate malice or oppression by Defendant Sosa.

In addition, kidnapping and arbitrary detention are not violations of *jus cogens* norms. *See* March 18, 1999 Order. While many courts have imposed punitive damage awards for violations under the Alien Tort Claims Act, those cases have involved the basest of human conduct such as murder, torture, and slavery. The Court does not mean to suggest that transborder abductions are ever permissible instruments of policy, but the Court thinks it obvious that abductions do not offend traditional human decency to the same degree as murder or torture. In sum, while the Court recognizes that the Alien Tort Claims Act would allow the imposition of punitive damages-and that such damages might be properly imposed

with respect to kidnappings in the future-the Court feels that punitive damages are inappropriate in the first case raising the issue.

Independently, the Court finds that the particular facts of this case justify rejecting the imposition of punitive damages. First, Defendant Sosa's conduct, while impermissible and in violation of international law, does not justify punitive damages. Defendant Sosa did violate the law for personal gain. However, Defendant Sosa did so at the urging of the United States government under the belief that his action was lawful based on a warrant and indictment in the United States. Defendant Sosa did not instigate the plan to kidnap Plaintiff, nor was he an important player in the execution of the plan. In fact, Defendant Sosa was one of a team of individuals hired as a second choice to carry out the plan.

Second, punitive damages would not have a deterrent effect. Defendant Sosa need not be deterred. He is now living in the United States as part of the witness protection program and earning a modest amount of money.[7] He cannot return to his home country of Mexico, nor can he even decide where to live within the United States. Punishing Defendant Sosa is also not likely to deter others. It could be that a punitive damage award against Defendant would make low level actors here and abroad think twice before participating in such activities in the future. However, the driving force behind the unfortunate events of this case was the United States. A damage award against the United States provides the only real hope of deterrence, but the court's prior Order forecloses that possibility.

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[7] In fact, while the Court does not have any competent evidence of Defendant Sosa's financial situation, it seems clear that any imposition of punitive damages would create too significant a financial burden. *See, e.g., Adams v. Murakami*, 54 Cal. 3d 105, 119 (1991).

III. Conclusion

For all the reasons outlined above, the Court FINDS for Defendant Sosa on Plaintiff's sixth and eighth causes of action and AWARDS Plaintiff damages on his first and fourth causes of action in the amount of $25,000.

IT IS SO ORDERED.

DATED: 9/9/99

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

[Filed May 18, 1999]

No. CV 93-4072 SVW (SHx)

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

ORDER

Plaintiff's complaint included a claim for prolonged arbitrary detention, which Plaintiff sometimes dubs simply arbitrary detention, based on Plaintiffs arrest in Mexico and subsequent detention by Defendant Sosa and then United States authorities. The Court reserved a ruling on Defendant Sosa's motion for summary judgment with respect to this claim and sought further briefing. In the Court's Order of March 18, 1999, the Court reported that while it appeared that the Court would grant summary judgment for Plaintiff on the arbitrary detention claim, the Court would allow Defendant a further response. The Court also asked the parties to address the interrelation between the arbitrary detention claim and the kidnapping claim on which the Court granted summary judgment for Plaintiff. The parties responded to the Court's Order and the Court further inquired into the matter at the hearing on May 3, 1999.

The Court's analysis of this issue in the March 18, 1999, Order relied largely on *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998). In *Martinez*, the Ninth Circuit explained that "detention is arbitrary 'if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Id.* (citing Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt.h (1987)). The Ninth Circuit rejected the plaintiff's claim in *Martinez* because the authorities arrested Martinez pursuant to law under a valid Mexican arrest warrant and detained him in a manner consistent with acceptable common practice. In the instant case, Defendant Sosa arrested and detained Plaintiff in Mexico without lawful authority.

Plaintiff agrees that the kidnapping claim covers the same action involved in the arbitrary detention claim. Plaintiff also asserts that any amount of time suffices to establish a claim for arbitrary detention. Plaintiff only refers to the claim as "prolonged" arbitrary detention because of the length of Plaintiff's detention in Mexico and his subsequent detention in the United States. The Court will need to establish the scope of damages for the arbitrary detention claim, as it will for the kidnapping claim. The Court discusses that issue below.

Defendant Sosa argues that an arrest without a warrant does not amount to arbitrary detention and that such a holding would create a dangerous precedent. The Court does not suggest that a lawful arrest requires a warrant or that the lack of a warrant amounts to a lack of lawful authority. Defendant Sosa acted without lawful authority in Mexico by arresting Plaintiff on the basis of a warrant issued in the United States, but without a Mexican warrant or other consent of the Mexican government or authorities. The Court's finding that Defendant Sosa kidnapped Plaintiff establishes that Sosa detained Plaintiff without lawful authority.

Defendant Sosa also points out that the *Martinez* court considered the arrest and detention separately. Defendant Sosa correctly describes *Martinez*, but that description does not govern this case. The *Martinez* court decided that the officers made a valid arrest so the court then had to consider whether or not the length or conditions of detention made it arbitrary. In the instant case, the arrest occurred without lawful authority which makes the detention arbitrary regardless of its length or conditions.

Defendant Sosa then claims that the detention did not occur for a long enough period of time to support a cause of action. Sosa cites comment h to the Restatement which concludes: "A single, brief, arbitrary detention by an official of a state party to one of the principal international agreements might violate that agreement; arbitrary detention violates customary international law if it is prolonged and practiced as a state policy."

This concern again raises the question of the proper scope of damages. Simply put, the Court must determine whether Defendant Sosa must face liability for the entire period of time for which Plaintiff was detained in Mexico and the United States, or if Defendant Sosa's liability should cease at the point at which Sosa turned Plaintiff over to United States authorities in El Paso. Both parties at the May 3 hearing informed the Court that the scope of damages affects the evidence which they wish to present at trial. The Court does not know how the evidentiary presentation would differ: Plaintiff has waived economic and psychological damages and the length of Plaintiff's detention could be easily established. However, the Court wants to obtain a complete record before making a decision on the damages issue. For all these reasons, the Court: (1) DENIES Defendant Sosa's motion for summary judgment and GRANTS Plaintiff's motion for summary judgment with respect to Plaintiff's claim for arbitrary detention, as the Court suggested in its

March 18, 1999 Order; (2) ORDERS both parties to proceed with evidence on the full range of potential damages at trial; and (3) RESERVES a ruling on the appropriate scope of damages for Defendant Sosa's kidnapping and arbitrary detention of Plaintiff.

IT IS SO ORDERED.

DATED: 5/18/99

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

[Filed Mar 18, 1999]

No. CV 93-4072 SVW (SHx)

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

ORDER

I. Introduction

The facts of this case are well known to the parties and the courts of the United States and this Court will not belabor them here. In short, in April 1990, individuals acting on behalf of the United States Drug Enforcement Administration seized Plaintiff Alvarez from Guadalajara, Mexico, and brought him to El Paso, Texas, because of Plaintiff's alleged role in the torture and death of DEA Agent Enrique Camarena. The United States had already indicted Plaintiff in Los Angeles, and obtained a warrant for his arrest, based on his alleged role in Agent Camarena's death. After resolving the jurisdictional issue, *United States v. Caro-Quintero*, 745 F. Supp. 599, 601 (C.D. Cal. 1990), *aff'd sub nom United States v. Alvarez-Machain*, 946 F. 2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 665 (1992), the case proceeded to trial and the district court granted Plaintiff's motion for acquittal.

On July 9, 1993, Plaintiff filed the instant suit and alleged eleven causes of action against the United States and various

individual defendants. Defendants moved to dismiss the complaint. Judge Davies, the previous judge handling the matter, granted the motion in part and denied the motion in part. *See* Memorandum Opinion Regarding the Defendant's Motions to Dismiss and to Substitute, filed January 20, 1995. The Ninth Circuit affirmed in part, reversed in part, and remanded the matter back to the district court. *Alvarez-Machain v. United States*, 107 F.3d 696 (9th Cir. 1997). This Court received the case after Judge Davies retired from the bench. The parties then filed a number of motions. Plaintiff filed a motion for partial summary judgment against the United States and a motion for partial summary judgment against Defendant Sosa. Defendant Sosa and the United States moved to substitute the United States for Defendant Sosa pursuant to 28 U.S.C. § 2679 ("Westfall Act"). Finally, Defendant Sosa, Defendant United States, Defendant Garate-Bustamante, and Defendants Berrellez, Gruden, Lawn, and Waters, all filed motions for summary judgment. The Court held a hearing in this matter on March 1, 1999.

II. Defendant Sosa's Motion for Substitution

Defendant Sosa argues that the Court should substitute the United States in his place with respect to Plaintiff's non-constitutional claims pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act). 28 U.S.C. § 2679.[1]

The Westfall Act allows the Attorney General to certify an individual's status as an employee acting within the scope of his or her employment and thereby substitute the United States in his or her place as a defendant, except with respect

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[1] Judge Davies' past Order substituted the United States for Defendants Berrellez, Waters, Gruden, and Lawn. Plaintiff subsequently stipulated to the substitution of the United States for Defendant Garate-Bustamante. Thus, of the individual Defendants, only Defendant Sosa remains in this regard.

to constitutional claims or claims with respect to the violation of certain federal statutes. 28 U.S.C. § 2679(b). In this case, Helene Goldberg, Director of the Torts Branch of the Civil Division of the Department of Justice, has on two occasions [2] certified that Defendant Sosa acted as an employee within the scope of his authority at all times relevant to this suit. *See* Sosa's Motion to Substitute, Exh. A.; United States' Motion to Substitute, Exh. A.

Certification by the Attorney General settles the issue unless challenged. *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995). Plaintiff challenges the certification of the Attorney General and argues that Sosa was not an "employee" of the United States, but merely an independent contractor. Plaintiff bears the burden of disproving the Attorney General's certification and the determination of "employee" status relies on federal law. *Id. See also Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993).

The Federal Tort Claims Act defines employees of the government as "persons acting or behalf of a federal agency in an official capacity, temporarily permanently in the service of the United States, whether with or without compensation." 28 U.S.C. § 2671. The Supreme Court has explained that independent contractors do not fall within this broad definition of "employees." *United States v. Orleans*, 425 U.S. 807 (1976); *Logue v. United States*, 412 U.S. 521 (1973). The distinction between an employee and an independent contractor depends on "the existence of federal authority to control and supervise the 'detailed physical performance' and

[2] Judge Davies initially denied Sosa's motion for certification without prejudice so that Plaintiff could undertake discovery into the matter. The Attorney General, through Ms. Goldberg, certified Sosa a second time on February 3, 1999, after the close of discovery. The Court notes that while Ms. Goldberg signed her certification as "2/3/98," it is clear from the text and the time of submission that she meant "2/3/99" and simply made a mistake in writing the year.

'day-to-day operations' of the contractor, and not whether the agent must comply with federal standards and regulations." *Ducey v. United States*, 713 F.2d 504, 516 (9th Cir. 1983) (quoting *Orleans*, 425 U.S. at 814-15). *See also Will v. United States*, 60 F.3d 656, 659 (9th Cir. 1995); *Carrillo v. United States*, 5 F.3d 1302, 1304 (9th Cir. 1993).

In *Logue*, the Supreme Court explained the term "employee" by examining the definition of "servant" in the Second Restatement of Agency, section 220. 412 U.S. at 527. The Restatement lists the following factors:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and 0) whether the principal is or is not in business.

The Ninth Circuit has adopted this approach, but has not considered a situation similar to Defendant Sosa's. The so-called "informant" cases provide the closest analog. In *Slagle v. United States*, 612 F.2d 1157, 1159-61 (9th. Cir. 1980), the court agreed with the district court's conclusion that the government informant at issue was not an employee. The court adopted the lower court's reasoning that the government had no right of control nor actual control" of the informant. *Id.* at 1161. In *Slagle*, the informant at issue volunteered to

work for the government pursuant to very lax oversight in which the informant would create his own assignments. In the event which led to liability in the case, the informant, carried a gun in violation of agency policy and set out on a trip to gather information without receiving approval from anyone in the agency.

By contrast, in Leaf v. United States, 661 F.2d 740 (9th Cir. 1981), the court approved the decision of the district court which considered an informant an agent of the government.[3] Bean, the informant in the case, volunteered to perform undercover operations on behalf of the government. The court explained that Bean undertook the actions at issue with "full knowledge and approval of his supervisors." *Id.* at 741.

The Ninth Circuit attempted to harmonize these two cases in *Wang v. Horio*, 45 F.3d 1362 (9th Cir. 1995). In *Wang*, the court stated that "[g]enerally an informant is not a government employee. Sometimes someone 'who is not the run-of-the-mill informant' may be found to be one." *Id.* at 1364 (citations omitted). The district court in *Wang* had initially deemed the informant an employee but the Ninth Circuit reversed and remanded so that the district court could hold a more complete evidentiary hearing. On remand, the district court again found employee status and then ordered the United States, which had resisted certification, to pay fees to the informant. That fee award served as the basis of the appeal cited above, 45 F.3d 1362, and the Ninth Circuit only decided to reverse the award by concluding that the government's position that the informant was not an employee was substantially jusfied. The district court's decision, which remains intact on this point, held that the

[3] While the opinion in *Leaf* did not explicitly classify the informant as an "employee," the opinion did call the informant an agent and then proceeded to consider other defenses under the Federal Tort Claims Act. Thus, despite some imprecision, the court's finding does apply to the interpretation of "employee."

informant was an employee despite the fact that the IRS repeatedly told him he was not an employee, he did not receive any compensation, he could have withdrawn at any time, and, in fact, he had a full time job with the individuals against whom he provided information.

Plaintiff's evidence demonstrates that Defendant Sosa did not serve as an employee of the government in the actions involved in this case.[4] Plaintiff explains that Defendant Berrellez asked Defendant Garate-Bustamante, a salaried DEA operative, to arrange for Plaintiff's removal from Mexico. Garate, in turn, communicated with a man named Ignacio Barragan, now deceased, who was a former member of Mexican law enforcement. Garate enlisted Barragan to hire individuals to seize Plaintiff and transport him to the United States. The record clearly demonstrates that the DEA, through Berrellez and Garate, instructed Barragan to (1) hire Mexican law enforcement personnel to perform the task and (2) command those individuals not to harm Plaintiff on his trip to the United States. Garate Depo. at 158, 207-08; Berrellez Depo. at 102-04. In addition, the DEA only planned to pay for the operation upon Plaintiff's arrival in El Paso unharmed. Garate Depo. at 173; Berrellez Depo. at 104. Berrellez and Garate learned after the fact that Defendant Sosa was one of the individuals hired by Baragan who participated in Plaintiff's seizure and trip to the United States. Berrellez Depo. at 97-98; Garate Depo. at 205-206.

[4] Sosa argued that the Court could not consider Plaintiff's arguments that Sosa was not an employee of the government due to the law of the case and Plaintiff's own pleadings. The Court disagrees. No court in the history of this litigation has found that Sosa was an employee of the government. Only Judge Davies faced the question; he denied Sosa's motion for substitution on the state of the record at the time and rejected the same arguments for estoppel. Order at 32-33. Both sides describe Sosa's relationship in different ways at different times. Nevertheless, Sosa could be an "agent" of the government without being an "employee."

Plaintiff submits that this chain of events shows that the government did not have the "authority to control and supervise the 'detailed physical performance' and 'day-to-day operations"' of Sosa or the "arrest team" before or during the operation in Mexico. Plaintiff contends that while Plaintiff bears the burden of disproving Sosa's employment, the record remains bereft of any evidence of the authority to control the operation. The Court agrees. The record shows that Garate maintained frequent contact with Barragan and that Berrellez spoke directly with Barragan on the phone on four or five occasions. Garate twice traveled to Mexico to meet with Barragan. Nevertheless, despite the government's degree of control over Barragan,[5] Plaintiff offers convincing evidence that no government employee had any degree of control or authority to control the actions of Sosa.[6]

Neither Garate nor Berrellez knew any of the details of the plan to seize Plaintiff in Mexico. The record reflects that Barragan called Garate on April 2, 1990. Barragan informed Garate that the team had custody of Plaintiff. Plaintiff's counsel asked Garate in Garate's deposition, "[p]rior to that call, did you have any information that the operation was going to take place on April 2nd?" Garate answered "[n]o sir. The operation-he was already on his way. Whenever it

[5] Due to Barragan's death, the Court has not had the opportunity to consider the employment status of Barragan. The Court has serious questions about whether it could classify Barragan as an employee for purposes of the Westfall Act. Nevertheless, the parties have not urged the Court to decide that question and the record reveals little about what degree of control Barragan exercised over the operation in Mexico. Thus the Court will examine the authority or actual control of the government employees in this case: Garate and Berrellez.

[6] Sosa argues that under the approach of *B & A Marine Co. v. American Foreign Shipping Co.*, 23 F.3d 709, 713 (2d Cir. 1994), the government can exercise its control directly or through an intermediary. The Court need not reach that issue because no individual in the government's chain of authority above Sosa had the authority to control Sosa's actions.

happens, happens." Garate Depo. at 214. Berrellez also admitted that he did not know any of the plan surrounding the details of the arrest. Berrellez Depo. at 147. Garate and Berrellez did not have any further contact with the arrest team until after the plane touched down in El Paso and they did not even know the names of the individuals involved until after the fact. Garate Depo. at 206, 212; Berrellez Depo at 117. As Plaintiff aptly describes the issue in his brief, "Garate simply put the entire operation in Barragan's hands." Plaintiff's Opposition to Defendant Sosa's Motion for Substitution at 6. The record demonstrates an utter lack of actual control or even the right to control the detailed physical performance of Sosa's actions.

In addition, while the Court finds the factors in the Second Restatement of Agency difficult to apply in the informant setting, the listed factors which might apply also suggest that Sosa acted as an independent contractor. The Court has already discussed the most critical factor, extent of control, above. The United States did not supply any of the instrumentalities or tools for the operation. In fact, Garate stated in his deposition that he told Barragan at one point that "it had to be a strictly Mexican operation. We cannot even give them chewing gum. They have to come up with everything." Garate Depo. at 188. In addition, Sosa performed a one time service which took little time and the United States planned to compensate him for the job as a whole, not pay by the hour.[7]

[7] Sosa argues that the statutory definition. preempts these two provisions of the Restatement. Section 2671 provides that one may serve as an employee "temporarily or permanently in the service of the United States, whether with or without compensation." The Court agrees that this language allows a court to find an individual an employee of the government even if that person acted for a short period of time without compensation. However, the statute does not suggest that those factors do not relate to the determination of employee status. Sosa cites no authority for that proposition, nor does the Court know of any such authority. The Court feels that the statute merely applies the Restatement in this context: length

The parties could not have believed that they were creating a master and servant relationship. While Sosa hoped that the DEA would pay him and provide a recommendation for his future employment, Sosa never communicated with anyone in the United States government and the government did not even know Sosa's identity until well after the fact.

The remaining factors do not seem to apply in this setting: the Court cannot conclude whether or not Sosa was "engaged in a distinct occupation or business," whether the work "is usually done under the direction of the employer or by a specialist without supervision," the skill required, whether the work "is a part of the regular business of the employer," or whether or not the principal "is or is not in business."[8]

In short, the DEA sought individuals who could work in Mexico to bring Plaintiff to the United States. Government employees gave explicit instructions on the person it wanted seized, the background of those who would seize him, and how those individuals should treat him during his trip to the United States. At a later stage, government employees instructed the arrest team where to fly the plane and obtained clearance for the plane to land. Beyond that, the government turned the operation over to the team of individuals and had no idea how or when the arrest would occur, or even the identities of those who made the arrest. The government did not control the operation, nor did it assert any right to do so.

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of employment and compensation are factors, but not decisive factors, in the determination of employee status.

[8] The Court suspects that this sort or covert operation is not a 'distinct business," that it is "often done by a specialist without supervision," that it requires some skill, that while arrests are part of the regular business of the DEA, covert arrests in another country are not, and that the DEA is not "in business" as defined in the Restatement. Nonetheless, the Court finds these particular categories more relevant to the typical employment context and the record does not contain enough information for the Court to decide these issues.

The government wanted the fruits of the plan (Plaintiff's arrest in the United States) but did not involve itself, in any meaningful way, in the plan itself. For this reason, the Court finds that under the Ninth Circuit's "control" test, or even the broader test of *Logue* and the Second Restatement of Agency, Defendant Sosa was not an employee. Accordingly, the Court DENIES the motion to substitute by Defendant Sosa and Defendant United States.

III. Defendant Bellerez, Gruden, Lawn, and Waters' Motion for Summary Judgment and Defendant Garate-Bustamante's Motion for Summary Judgment

Plaintiff asserts *Bivens* claims against all of these individual Defendants. At the outset of the case, Plaintiff based his claims on the alleged violation of the Fourth, Fifth, and Eighth Amendments, for Defendants' actions during the entire range of the operation: from Plaintiff's arrest in Mexico through his detention in the United States. Judge Davies dismissed the *Bivens* claims arising out of conduct in Mexico. He reasoned that the Eighth Amendment did not apply to any of the conduct at issue and that the Fourth and Fifth Amendment did not apply extraterritorially. Order at 26, 40-42. The Ninth Circuit affirmed, although on a different ground. *Alvarez*, 107 F. 3d at 702. The Ninth Circuit relied on its own finding, which it made on remand from the Supreme Court in Plaintiff's criminal case, that no conduct in Mexico violated Due Process. *Id.* While Plaintiff asserts that he might still possess *a Bivens* cause of action for the plan to kidnap him in Mexico in violation of United States and international law, he agrees that Judge Davies decided this issue and does not seek to relitigate it here. Notice of Non-Opposition to Motion for Summary Judgment on Plaintiff's *Bivens* Claims Filed by Defendants Berrellez, Gruden, Lawn, and Waters at 1. Plaintiff also conceded his ability to pursue *a Bivens* claim based upon his "treatment during his interrogation in Texas." Memorandum of Points and Authorities in Partial Opposition

to Defendant Garate-Bustamante's Motion for Summary Judgment at 2.

Thus, at this stage in the litigation, Plaintiff only advances a "narrow" *Bivens* claim relating to the "Fourth or Fifth Amendment claim with respect to the portion of the kidnapping occurring within U.S. territory." *Id.* at 2-3. In short, Plaintiff asserts a claim based upon his unlawful "seizure" by Sosa, an agent of the United States, for the brief distance between the point at which the airplane crossed the U.S. border to its landing at the airport in El Paso, Texas-a distance of less than five miles. Declaration of Hank Webb at 1.

As an initial matter, the Court notes that Plaintiff can only allege *a Bivens* claim based on this allegedly unlawful seizure under the Fourth, not the Fifth, Amendment. *Graham v. Connor*, 490 U.S. 386 (1989); *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996). Plaintiff's claim fails because he cannot demonstrate an unlawful seizure. A grand jury in Los Angeles had indicted Plaintiff for a felony and a judge of this Court had issued a warrant for Plaintiff's arrest. These two facts each independently established the probable cause necessary for a valid seizure under the Fourth Amendment. *Gerstein v. Pugh*, 420 U.S. 103, 113-16 (1975). Thus Defendant Sosa, acting on the behalf of law enforcement agents, seized Plaintiff in the United States pursuant to ample probable cause.

Plaintiff attempts to revive his claim by pointing out that the Federal Rules of Criminal Procedure do not authorize private individuals to execute arrest warrants. Yet a violation of a Federal Rule of Criminal Procedure does not rise to constitutional significance. The simple fact remains that probable cause existed to seize Plaintiff in the United States and Defendant Sosa, at the direction of federal law enforcement, made such a seizure. Plaintiff cannot establish a constitutional violation and thus the Court GRANTS the motion for summary judgment on behalf of Defendants Berrellez, Waters, Gruden, and Garate-Bustamante.[9]

IV. United States' Motion for Summary Judgment

The United States faces liability for the actions of its agents pursuant to the Federal Tort Claims Act. Plaintiff has the following claims remaining against the United States: (1) kidnapping, (3) cruel, inhuman, and degrading treatment, (6) assault and battery, (7) false imprisonment, (8) intentional infliction of emotional distress, (9) false arrest, (10) negligent employment, and (11) negligent infliction of emotional distress.[10] The United States divides Plaintiff's claims into three categories: (1) those relating to Plaintiff's arrest in Mexico and return to the United States (false arrest, false imprisonment, kidnapping, intentional infliction of emotional distress, and negligent infliction of emotional distress); (2) those relating to Plaintiff's treatment in Mexico (cruel, inhuman, and degrading treatment, assault and battery, negligent employment, intentional infliction of emotional distress, and negligent infliction of emotional distress), and negligent

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[9] These Defendants offer a number of other bases in support of their motions. The Court notes that it would almost undoubtably apply qualified immunity to the federal employees with respect to this claim even if Plaintiff could demonstrate a violation of the Constitution. The Court would certainly find that a reasonable officer would have thought that he or she could direct another to make an arrest domestically based on a warrant and an indictment. The Court also finds Defendants' argument fairly persuasive that courts might not even apply Fourth Amendment protection to an individual in Plaintiff's situation. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). The Court does not need to reach those alternative arguments because it finds no violation of the Constitution in Plaintiff's seizure within the United States.

[10] Plaintiff agreed to abandon his claim for torture (number 2). Judge Davies previously dismissed Plaintiffs claim for prolonged arbitrary detention (number 4), and Plaintiff obviously does not assert his *Bivens* claims (number five) against the United States.

infliction of emotional distress), and (3) those relating to Plaintiffs treatment in the United States (intentional infliction of emotional distress and negligent infliction of emotional distress). The Court will adopt this organizational scheme to consider Plaintiff's claims and the defenses offered by the United States.

A. Applicable Law

The Federal Tort Claims Act states that the government faces liability as determined "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §§ 1346(b), 2672. Federal law determines the scope of the FTCA's exclusions and the determination of who is an "employee" for purposes of the statute. Aside from that, however, "state law ... determines whether the ultimate facts give rise to a cause of action in favor of the claimant. . . . a cause of action based entirely on federal law, and which has no counterpart in state law, is not cognizable under the Tort Claims Act. . . ." Jayson & Longstreth, 2 *Handling Federal Tort Claims* § 9.09(1) at 9-231 (1997) ("Treatise"). The Treatise also notes that "[o]cassionally, state law will incorporate principles of federal law into its tort law, and these principles will be applicable in determining the United States' liability as part of the 'law of the place'." *Id.* at 9-232-33. The Treatise explains that "[a]lthough the general rule dictates that the law of the state where the misconduct occurred governs the liability of the United States, there are some seeming departures from this rule. For example, to the extent that maritime torts are actionable under the Act, they are governed by maritime law." *Id.* at 9-239.

For reasons more fully discussed below, Plaintiff alleges that all of the actions which occurred in Mexico arose from a plan conceived in California. Accordingly, the parties agree that California law applies to the claims for Plaintiffs arrest and treatment in Mexico (category one and two above). Category three depends on actions taken in Texas. The parties

have not announced whether they feel that Texas or California law governs that situation. While the entire plan developed in California, the acts in Texas certainly "occurred" in Texas. The Court feels that Texas law should apply to Plaintiff's claims regarding his treatment in Texas (category three above). As discussed below, however, Texas and California contain virtually identical provisions of law on the issues in question and thus a choice of law analysis would not change the result.

Defendant United States employs the principles of state law at the outset to eliminate some of Plaintiff's claims. First, the United States asserts that California law does not contain a cause action for kidnapping, or cruel, inhuman, and degrading treatment. Defendant notes that it could not find a case in which a California court recognized either tort. Defendant asserts that the tort claims of false arrest or imprisonment and assault and battery provide a remedy for what Plaintiff terms kidnapping or cruel, inhuman, and degrading treatment. Defendant points to one civil case in which the state had previously convicted the defendant of kidnapping, and the plaintiff brought suit for false imprisonment, assault, and intentional infliction of emotional distress. *White v. County of Orange*, 166 Cal.App.3d 566, 568-69 (1985). Defendant adds that the California Book of Approved Jury Instructions ("BAR") does not contain an instruction outlining the elements of either claim.

Second, Defendant argues that California law does not recognize an independent cause of action for negligent infliction of emotional distress, but instead considers such claims through the prism of traditional negligence.[11] *Potter v.*

[11] Defendant also points out that Texas law agrees with California in this respect and does not contain an independent claim for negligent infliction of emotional distress. *Garza v. United States*, 881 F. Supp. 1103, 1108 (S.D. Tex. 1995); *Bowles v. Kerr*, 855 S.W.2d 593, 594, 597 (1993) (en banc). Plaintiff does not address this contention.

Firestone Tire & Rubber Co., 6 Cal. 4th 965, 984 (1993); *Lawson v. Mangement Activities, Inc.*, 81 Cal.Rptr.2d 745, 748 (Cal. App. 4th Dist. 1999). Third, Defendant explains that false arrest and false imprisonment do not constitute separate torts under California law. *Asgari v. City of Los Angeles*, 15 Cal. 4th 744, 752 n.3 (1998); *Collins v. City and County of San Francisco*, 50 Cal. App. 3d 671, 673 (1975).

Plaintiff claims that California law does contain a cause of action for kidnapping and cruel, inhuman, and degrading treatment.[12] Plaintiff's argument consists of two parts. First, principles of international law prohibit kidnapping and cruel, inhuman, and degrading treatment. Second, California law incorporates principles of international law into its common law. Plaintiff contends that several American courts have recognized these torts as actionable and adds that a California court would apply "generally agreed upon principles of international law."[13] Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant United States' Motion for Summary Judgment at 4 ("Opp. to U.S. Summ Judg").

The Court concludes that California law does not recognize the torts of kidnapping or cruel, inhuman, and degrading treatment. While Plaintiff correctly observes that California courts have applied international law to certain discrete situations, such as determining California's territorial jurisdiction, Plaintiff does not cite a single instance in the history of California case law, nor did the Court find an example, in which a California court has incorporated a violation of international law into its domestic law as a tort.

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[12] Plaintiff apparently concedes Defendant's position that California law does not recognize a cause of action for negligent infliction of emotional distress and explicitly agrees that false arrest and false imprisonment constitute one tort.

[13] The Court addresses the issue of international law more fully in section V below, which deals with claims against Defendant Sosa under the Alien Tort Claims Act.

In fact, the cases which Plaintiff cites as examples of situations in which American courts have recognized a prohibition on kidnapping or cruel treatment rely on the Alien Tort Claims Act, discussed in section V below, which explicitly contemplates the use of such law. *Abebe-Jiri v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Paul v. Arvil*, 901 F. Supp. 330 (S.D. Fla. 1994).

In addition, in this circumstance, Plaintiffs claims for false arrest and false imprisonment merge. The Court also concludes that Texas law does not contain a cause of action for negligent infliction of emotional distress. Accordingly, the Court GRANTS Defendant United States' motion for summary judgment with respect to claims one, three, and eleven (kidnapping, cruel, inhuman, and degrading treatment, and negligent infliction of emotional distress). The Court also GRANTS Defendant United States' motion for summary judgment with respect to claim seven or claim nine (false arrest and false imprisonment) to the extent that the motion challenges Plaintiffs ability to maintain the causes of action separately. The Court will consider these causes of action as one for the remainder of the case.

B. Negligent Employment

Plaintiff asserts a negligence claim based on Defendant's failure to investigate the backgrounds of the individuals who seized Plaintiff in Mexico. Plaintiff contends that he faced physical and psychological abuse at the hands of those individuals and that "[h]ad the United States learned the identity of the kidnappers, investigated their backgrounds, or even coordinated the 'arrest' with the Mexican authorities, Plaintiff would not have suffered the injuries he did." Opp. to U.S. Summ Judg at 12-13 (footnote omitted). Defendant argues that Plaintiff cannot demonstrate causation because Plaintiff offers no evidence that the failure to investigate the background of the individuals contributed to Plaintiffs alleged injury.

In California, "[t]o recover on a negligence theory, a plaintiff must prove duty, breach, causation, and damages." *Leslie G. v. Perry & Assoc.*, 43 Cal. App. 4th 472, 480 (1996). However, even if the Court accepts Plaintiff's contention that Defendant had a duty to investigate the backgrounds of the individuals involved in Plaintiffs seizure and that Defendant breached that duty, a causal connection must exist between the breach and the alleged harm to Plaintiff. *Id.* at 481. Under section 430 of the Restatement (Second) of Torts, applied by California courts, the negligence must "be a legal cause of the other's harm." Legal cause exists if the negligence serves as a "substantial factor" in causing the harm. Rest. 2d Torts § 431; *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1052 (1991).

Plaintiff cannot demonstrate that a failure by Defendant to learn the identity or investigate the backgrounds of the individuals in Mexico[14] played a "substantial factor" in Plaintiffs injuries. Plaintiff does not demonstrate that any of the individuals who seized Plaintiff in Mexico and conveyed him to the United States had any indications, such as violence, in their background which would have led the United States to not employ them. In fact, the only evidence in the record demonstrates that Sosa had never faced an investigation or even an accusation of violence or excessive force during his

[14] Plaintiff appears to raise a triable issue of fact regarding whether or not the United States failed to conduct an investigation. Defendant contends that it did not even breach a duty because there is no factual dispute that the government explicitly instructed Barragan to hire law enforcement personnel and to tell those personnel not to injure Plaintiff or even question him. Garate Depo. at 158, 207-08; Berrellez Depo. at 102-04. In addition, Defendant announced that it would not compensate the individuals of Plaintiff arrived in any other condition. Garate Depo. At 173; Berrellez Depo. at 104. Thus Defendant asserts that it took every reasonable precaution to avoid any injury to Plaintiff. The Court does not reach this issue due to Plaintiff's failure to demonstrate causation.

time in Mexico law enforcement, and never engaged in any domestic violence.[15] Sosa Depo. at 21.

Plaintiff adduces no evidence that demonstrates that Defendant's failure to investigate the backgrounds of the individuals involved in the operation in Mexico served as a "substantial factor" in Plaintiff's alleged injuries. This situation resembles *Nola M v. University of Southern California*, 16 Cal. App. 4th 421 (1993). In *Nola M.*, the court reversed a jury verdict in favor of a rape victim against the University of Southern California. *Id.* at 424. The victim had contended that the school negligently failed to deter the attack. The court concluded that the plaintiff did not provide any evidence that "two or ten or twenty more guards or other security measures could have prevented Nola's injuries." *Id.* As in that case, this Court has no evidence with which to conclude that an investigation would have provided any reason not to hire these particular individuals or prevented Plaintiffs injuries. Defendant Sosa's deposition shows that Defendant would have found no signs of violence in his background. Accordingly, the Court GRANTS Defendant United States' motion for summary judgment on count ten (negligent employment).

C. Foreign Claim Exclusion

The Federal Tort Claims Act contains an exception which exempts from coverage "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). Congress created this exception to retain sovereign immunity and ensure that the United States did not face liability under the laws of another sovereign. *Smith v. United States*, 507 U.S. 197, 201 (1993); *United States v. Spelar.*, 338 U.S. 217, 221 (1949). Defendant

[15] In fact, the only reported time in Defendant Sosa's background when he did abuse his power as a member of law enforcement, he solicited a bribe to *not* arrest someone. Sosa Depo. at 19-20.

suggests that the foreign claim exclusion prevents any recovery for Plaintiff based on the events that occurred in Mexico because those claims arose in a foreign country.

Plaintiff counters that the Court must decide Federal Tort Claims Act claims based on the law of the place in which the act or omission occurred, not the place where that act or omission had its "operative effect." *Richards v. United States*, 369 U.S. 1, 10 (1962); *Cominotto v. United States*, 802 F.2d 1127, 1129-30 (9th Cir. 1986). Plaintiff thus advances a "headquarters claim." *Cominotto*, 802 F.2d at 1130; *Leaf v. United States*, 586 F.2d 733, 736 (9th Cir. 1978). Plaintiff's headquarters claim contends that while the actual effects occurred in Mexico, all of the decisions about his seizure and removal to the United States, including Plaintiff's claim for negligent employment, occurred in California.

The Court agrees that Plaintiff has stated a valid "headquarters claim" at least with respect to his claim for false arrest/false imprisonment and intentional infliction of emotional distress from his seizure.[16] Plaintiff's claims in that

[16] The Court notes that a typical headquarters claim involves a situation in which negligence occurs domestically, but the injury from that negligence arises in a foreign country. In that situation, all of the elements of the tort of negligence have occurred in a state and only the injury arises elsewhere. Plaintiff alleges torts which arise from intentional, planned conduct. This situation does not fit the traditional headquarters claim because only the decision to arrest Plaintiff occurred in California, while the actual arrest happened in Mexico. Defendant United States thus offers a plausible distinction between this case and much of the case law: Plaintiff cannot allege that all of the elements of the tort occurred in the United States.

The Court did not find many cases that dealt with a headquarters claim based on intentional conduct. However, that finding does not surprise the Court because, as the Court discusses below, the Federal Tort Claims Act contains a general exception for intentional conduct, except on the part of law enforcement officers. Thus only a case like Plaintiffs could raise this question. Nevertheless, the D.C. Circuit did consider a similar situation in

regard resemble those asserted in a number of cases in which courts have found a valid "headquarters claim" and refused to apply the foreign claim exclusion. Most recently, the Eleventh Circuit decided that the failure of the DEA and Customs to coordinate an operation led to the incarceration of a number of individuals in Honduras. *Couzado v. United States*, 105 F.3d 1389, 1394-96 (11th Cir. 1997). In that case, while the actual arrest and injury occurred in Honduras, the court found that the negligent act or omission occurred in the United States. *Id.* A number of other courts have reached similar results where acts or omissions in the United States lead to liability elsewhere. *See Sami*, 617 F.2d at 761-63; *Leaf*, 588 F.2d at 735; *Mulloy v. United States*, 884 F. Supp. 622, 633 (D. Mass. 1995) (accepting a headquarters claim based on the failure to warn or supervise); *Donahue v. United States Dep't of Justice*, 751 F. Supp. 45, 48-49 (S.D.N.Y. 1990) (allowing a headquarters claim for negligence by an informant working in a foreign country); *Glickman v. United States*, 626 F. Supp. 171, 174 (S.D.N.Y. 1985) (finding that a plan developed in the United States but carried out in Paris stated a valid headquarters claim); *In re Agent Orange*, 580 F. Supp. 1242, 1254-55 (E.D.N.Y. 1984) (refusing to apply the foreign claim exclusion to product liability claims when decision to use Agent Orange and development of its technical specifications occurred in the United States).

Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979). The *Sami* court refused to apply the foreign claim exception to plaintiff's claim of false arrest in Germany based on the intentional actions of U.S. government officials in the United States. *Id.* at 761-62. Indeed, a contrary rule would suggest that the United States could face liability for negligent actions of its officials which cause injury in another country but not the intentional acts of its law enforcement officials which cause the same injury. The Court's decision does not run afoul of the underlying policy of the exception—to prevent the United States from facing liability based on foreign law—because the Court does not apply Mexican law to the causes of action.

Plaintiff states a valid "headquarters claim" for his seizure because it stemmed from a plan which developed entirely within the United States. Plaintiff's cause of action for assault and battery and the resulting intentional infliction of emotional distress based on that assault and battery do not raise a "headquarters claim." As set forth above, the undisputed evidence in the record shows that Defendants Berrellez and Garate explicitly instructed Barragan, and thus Sosa, not to harm Plaintiff, or even question him, during his seizure and trip to the United States. In fact, the United States announced that it would not accept Plaintiff, or pay any money for the operation, if Plaintiff appeared harmed in any way upon his arrival in El Paso. The United States formed no domestic plan to assault or batter Plaintiff. Thus, Plaintiff's cause of action arose in Mexico and the foreign claim exclusion bars recovery against the United States.[17] Accordingly, the Court GRANTS Defendant United States' motion for summary judgment with respect to claim six (assault and battery) and the part of claim eight (intentional infliction of emotional

[17] Plaintiff did assert a negligent employment claim, discussed above, in which he suggests that poor planning in the United States led to his injuries. That claim would also provide the same potential for relief for the same injuries Plaintiff alleges in his assault and battery and intentional infliction of emotional distress based on the battery.

The Court adds that the foreign claim exclusion bars almost the entirety of the claim for assault and battery. Plaintiff has contended throughout this case, and the previous criminal trial, that the agents of the government engaged in a variety of abusive acts in Mexico. The foreign claim exclusion, for the reasons above, clearly bars those claims. Plaintiff could assert, however, that the simple touching for the purposes of the arrest, or fright pursuant to the arrest, constitutes an assault and battery which the government's plan explicitly contemplated. Thus Plaintiff might assert a headquarters claim for assault and battery based on the touching incident to the seizure in Mexico. Plaintiff's claim, would survive the foreign claim exclusion if he utilized that theory. The Court will discuss the merits of such a claim, including any privilege to use such minimal force incident to arrest, in subsection E below.

distress) as it relies on claim six. The Court REJECTS the foreign claim exclusion as a basis for Defendant United States' motion for summary judgment with respect to claim seven and nine (false arrest/false imprisonment) and claim eight as it arises from claim seven and nine.[18]

D. Intentional Tort Exception

Defendant argues that the intentional tort exception, prevents liability for Plaintiffs claims of assault, battery, and false arrest/false imprisonment. The Federal Tort Claims Act contains an explicit exception for "any claim arising out of assault, battery, false imprisonment, [or] false arrest" unless the claims arise out of the "acts or omissions of investigative or law enforcement officers of the United States government." 28 U.S.C. § 2680(h). The exception specifically defines "investigative or law enforcement officers" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* Defendant argues, quite simply, that the individuals in Mexico dial not fit within this definition of "investigative or law enforcement officers" and thus Plaintiff cannot state a claim against the United States for assault, battery, or false arrest/false imprisonment.

Defendant cites cases in which courts have found that a variety of federal employees do not fall within the definition: Marine security guards, investigators of the Equal Employment Opportunity Commission, federal magistrates and judges, Assistant United States Attorneys, and parole officers. *See* Memorandum of Points and Authorities in Support or

[18] The Court reaches this conclusion at least as an initial matter. As the Court discusses in subsection E, the Court must decide whether or not Defendant's actions constitute false arrest/false imprisonment based on the "law of the place," in this case California. To the extent that California would utilize foreign law to hold the United States accountable, the policy behind the foreign claim exclusion will arise again.

United States' Motion for Summary Judgment at 20-21 and cases cited *infra*. The Court's research also produced a case in which the court applied the exception to the actions of non-law enforcement individuals who tricked members of law enforcement into an unjustified arrest. *Metz v. United States*, 788 F.2d 1528 (11th Cir. 1986). However, the Court's research did not turn up a case which presented the opposite scenario: a law enforcement officer who directed someone else to perform a false arrest or imprisonment.

Plaintiff offers two basic arguments in response. First, the individuals in Mexico acted as law enforcement officers for these purposes. Second, Plaintiff's claim contemplates liability for the actions of the law enforcement officers in the United States and those individuals should face liability for instructing others to do what the law enforcement individuals could not. Plaintiff couples this argument with the observation that the law enforcement exception to the intentional tort exception exists to protect "innocent victims of Federal law enforcement abuses." *Sami*, 617 F.2d at 764 (quoting S. Rep. No. 588, 93rd Cong., 1st Sess. 3-4 (1973)). The Court finds this second argument persuasive. As noted above, the Court does not know of a case in which a court applied the intentional tort exception to an individual who acted at the direction of a law enforcement office. That result would not make sense: law enforcement officers could enlist private citizens or others to commit torts and thus shield the United States from liability. For this reason, the Court REJECTS the intentional tort exception as a basis for Defendant United States' motion for summary judgment.

E. False Arrest/False Imprisonment

The Court has already found that the exclusions in the Federal Tort Claims Act bar a number of Plaintiff's claims against the United States. The Court must still address, however, Plaintiff's claims for false arrest/false imprisonment

and intentional infliction of emotional distress based on that arrest.[19]

As outlined in subsection A above, the Court must apply the law of the place, California, under the Federal Tort Claims Act.[20] The Court cannot apply federal law, unless California courts would look to federal standards in reaching their decisions; the Court also cannot apply international law, because the Court found that California law does not include torts based on the law of nations. Finally, the Court cannot apply the law of a foreign sovereign, in this case Mexico, due to the foreign claim exclusion and the policy of *Spelar*. Thus the Court must determine how a California court would analyze Plaintiffs tort claims.[21]

California defines a false arrest as an arrest conducted without lawful authority. *See e.g., Scofield v. Critical Care*

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[19] As noted above, Plaintiff may also retain a claim for assault and battery and intentional infliction of emotional distress, but only to the extent required for an arrest.

[20] The Court must apply the whole of California law, which includes it choice of law rules. *Richards v. United States*, 369 U.S. 1 (1962). The Court assumes that California would apply its own, forum law. *Marsh v. Burrell*, 805 F. Supp. 1493, 1496 (N.D. Cal. 1992); *Hurtado v. Superior Court*, 11 Cal. 3d 574 (1974) (en banc). If the Court concluded that California would apply the law of Mexico, then the foreign claim exclusion would bar Plaintiffs claims. *Spelar*, 338 U.S. at 221. *See also* James A. Shapiro, *Choice of Law Under the Federal Tort Claims Act: Richards and Renvoi Revisited*, 70 N.C.L. Rev. 641, 659-60 (1992).

[21] The Ninth Circuit has applied the law of the state for FTCA purposes even when that law was "riddled [] with exceptions and inconsistencies" compared to a rational approach taken by another state. *Epling v. United States*, 453 F.2d 327, 329 (9th Cir. 1971). In addition, when the highest court of a state has not ruled, the district court must "make a reasonable determination, based upon such recognized sourced as statutes, treatises, restatements and published opinions, as to the result that the highest state court would reach if it were deciding the case." *Molsbergen v. United States*, 757 F.2d 1016, 1020 (9th Cir. 1985).

Medicine, Inc., 45 Cal. App. 4th 990 (1996). Defendant argues that the existence of a felony warrant and indictment made lawful an arrest by Sosa at the direction of federal law enforcement. Plaintiff counters that any statutory immunity does not apply to these actions and that malice on the part of the arresting individuals made the arrest unlawful.

California law distinguishes between "peace officers" and private individuals with respect to the ability to make lawful arrests. California Penal Code section 834 provides that a peace officer or a private person can make an arrest. Section 837 states that a "private person may arrest another . . . When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it." Section 836 allows a peace officer to make an arrest "[w]henever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." The courts of California treat peace officers like private citizens when those peace officers make arrests outside of their jurisdiction.[22] *See e.g., People v. Monson*, 28 Cal. App. 3d 935, 939-40 (1972); *People v. Califano*, 5 Cal. App. 3d 476, 484 (1970). Thus California clearly allows a private citizen or a peace officer to make an arrest pursuant to a valid felony warrant and indictment.

The parties discuss one other provision of California law. Civil Code section 43.55, formerly section 43.5(a), states that "[t]here shall be no liability on the part of, and no cause of action, shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and that the person arrested is the one referred to in the warrant."

[22] California law allows the use of some force incident to an arrest. Section 835(a) allows a peace officer to use "reasonable force" to effect the arrest, while section 835 states more generally that the "persons arrested may be subjected to such restraint as is reasonable for his arrest and detention."

Thus California does not allow a suit for false arrest when (1) an officer makes an arrest pursuant to a warrant or (2) when the arrest occurs with lawful authority. In other words, California would not hold a peace officer liable for an arrest pursuant to a warrant valid on its face which later proves deficient; California would also not arrest after a felony had been committed and the individual had reason to believe that the arrestee committed the offense.

These provisions do not provide a complete answer to the question in the instant case. Had a private citizen or a California peace officer arrested Plaintiff in California, a California court would clearly not hold that individual liable for false arrest or imprisonment.[23] Yet Defendant Sosa, at the direction of federal law enforcement, arrested Plaintiff in Mexico pursuant to a valid United States warrant and indictment. The question for this Court then is how a California court would apply principles of California law to that situation. One permutation of this situation might prove instructive. What would a California court do if an individual came into California and arrested a person based on a warrant and indictment issued in another state or another country? While the Court finds this an exceedingly difficult hypothetical inquiry, it concludes that a California court would not hold Defendant Sosa or the federal law enforcement agents liable in this situation.

Plaintiff argues that a California court would draw a decisive distinction at the border of the United States and refuse to approve of an arrest in another country. The Court disagrees. California law approves of arrests made pursuant

[23] Plaintiff points out that the Federal Rules of Criminal Procedure limit the ability to utilize federal arrest warrants to member of federal law enforcement. Nevertheless, the existence of a federal warrant and indictment clearly provides probable cause for any individual to conclude that a felony has been committed and the person named in the warrant may have committed it.

to a warrant or indictment. While California law clearly does not apply outside of its borders, if California considered an extraterritorial arrest through the lens of its own law, it is unclear why the border would make a difference. For instance, California extends reciprocity to law enforcement officers of other states. Penal Code section 852.2 allows a foreign peace officer who enters California in "fresh pursuit" to exercise the same authority to arrest and hold a person in custody as a peace officer of California, provided that the foreign peace officer takes the prisoner before a magistrate in the county of the arrest. In addition, California does not appear to limit the definition of "private person" to only citizens of California.[24] Thus if a peace officer, or any individual, from, another state entered California with the requisite probable cause to arrest an individual, then California would presumably riot consider that action a false arrest.

Plaintiff offers two reasons for rejecting this interpretation of the law of California. First, he argues that the immunity granted by Civil Code section 43.55 does not apply to this situation. Plaintiff cites a few Ninth Circuit cases which seem to indicate that state immunity principles should not limit federal liability under the FTCA. *See Stuart v. United States*, 23 F.2d 1483, 1488 (9th Cir. 1994); *Wright v. United States*, 719 F.2d 1032, 1034-35 (9th Cir. 1983). Defendant counters with specific cases in which the Ninth Circuit has applied state immunity principles to a claim of false arrest under the FTCA. *See Ting v. United States*, 927 F.2d 1504, 1514 (9th

[24] The Court notes that some cases discuss an arrest by a private person as a "citizen's arrest," but it appears that courts use that term in a colloquial sense. *See e.g., Johanson v. Department of Motor Vehicles*, 36 Cal. App. 4th 1209, 1216 (1995); *People v. Taylor, 222* Cal. App. 3d 612, 618-19 (1990). The Court did not find any case in which a California court limited the definition of private person to a citizen of California. That result makes sense; it would create quite an anomaly if a visitor to the state could witness a felony but not restrain the perpetrator even though any other law abiding citizen could do so.

Cir. 1991); *Arnsberg v. United States*, 757 F.2d 917 (9th Cir. 1985).[25] The Court concludes that *Ting* directly governs this situation. Even though the parties have characterized the issue in terms of immunity, these arguments are more properly addressed in the context of a failure of proof. Defendant does not assert "immunity" in the sense used in the cases cited above. Instead, Defendant contends that the actions of the officers and Sosa do not amount to the tort of false arrest because California law considers their actions lawful. Because Plaintiff's arrest did not occur "without lawful authority," Plaintiff fails to satisfy an element of the tort.

Plaintiff's argument falls short for another reason: Civil Code section 43.55 applies to arrests made by peace officers pursuant to a warrant. Defendant does not only claim a defense based on the warrant, but instead says that the existence of the warrant and indictment created probable cause such that any citizen could lawfully arrest Plaintiff. Defendant does not claim that Sosa served the arrest warrant on Plaintiff in Mexico, it only contends that Sosa acted with lawful authority because of his knowledge of Plaintiff's connection to a felony.

Plaintiff also attempts to use the concept of malice to make the arrest unlawful. Civil Code section 43.55, discussed above, requires a peace officer to act without "malice" to receive the protection that the use of a warrant provides. California courts have found "malice" in situations where peace officers have made knowing omissions in obtaining a warrant or executed a warrant with the knowledge that it did not remain in force. *Laible v. Superior Court*, 157 Cal. App.

[25] Plaintiffs counsel admitted at the hearing that these two lines of cases seem to conflict. Nevertheless, he candidly admitted that *Ting* provides the most relevant precedent for the false arrest situation. The Court follows *Ting* in this instance and leaves harmonization of the precedents for a later case which raises the issue.

3d 44, 53 (1984); *McKay v. County of San Diego*, 111 Cal. App. 3d 251, 255-56 (1980); *Milliken v. City of South Pasadena*, 96 Cal. App. 3d 834, 842 (1979).

Plaintiff claims that because Defendant Sosa and the federal defendants knew that a Mexican arrest warrant did not exist, and that a United States federal warrant does not apply outside the United States, the arrest was with malice.[26] Each of these bases fail to demonstrate malice. As discussed above, California does not rely on the valid exercise of a warrant to immunize arrests. In order for a private citizen to make a lawful arrest, that citizen must only know that a felony has occurred and have a reasonable basis to think that the arrested individual committed the crime. The Defendants knew this, even if they could not lawfully exercise the warrant outside of the United States. Plaintiff cannot rely on the lack of a Mexican warrant, because that would make an arrest unlawful based on the law of Mexico-a result foreclosed by *Spelar* discussed above. From the perspective of California law, Defendants knew that a felony had occurred and had reason to think that Plaintiff committed it. That created a basis for an arrest by a peace officer or a private citizen.

The Court notes that this entire inquiry seems somewhat artificial. California has never faced the unusual situation presented in this case and does not have law which appears to address it. The Court finds no indication that California

[26] Section 43.55 provides immunity when an officer acts pursuant to a warrant that is valid on its face. The law attempts to shield officers from liability for executing warrants which later prove groundless or erroneous. That situation does not exist here: Defendants do not rely on a warrant later proven invalid. Neither party disputes that probable cause existed to arrest Plaintiff. The parties only disagree about whether Defendant Sosa could arrest Plaintiff in Mexico. Under California law, however, Sosa, a private citizen, or the law enforcement agents, could make a lawful arrest based on probable cause. Section 43.55 could provide immunity, but Defendants do not rely only on the provisions of that section.

would allow a person in Plaintiff's position to sue a California individual or peace officer for an arrest in Mexico. However, given the possibility that California might allow such a claim, the Court has attempted to examine this situation in significant depth. Perhaps, absent the ability to sue in federal court, a plaintiff in this situation might sue in Mexico. Perhaps, instead, California would look to Mexican law in its choice of law analysis. Unfortunately for Plaintiff, neither position helps him in this case. The Court cannot look to Mexican law, even if the Court concluded that a California court would apply it. Nevertheless, the Court feels that California courts would apply California law and find that the warrant and indictment supported the arrest. Accordingly, the Court GRANTS Defendant United States' motion for summary judgment with respect to Plaintiff's seventh and ninth claim (false arrest/false imprisonment) and Plaintiff's eighth claim with respect to the arrest (intentional infliction of emotional distress. As discussed above, to the extent that Plaintiff's sixth claim (assault and battery) stems from the minimal force needed to arrest Plaintiff, California law does not allow that force to amount to a tort. *See* Cal. Civil Code § 835(a). Thus the Court also GRANTS Defendant United States' motion for summary judgment with respect to Plaintiff's sixth and eighth causes of action based on the use of minimal force or the alleged fear from the use of that minimal force.

F. Events in El Paso

At the outset of the litigation, plaintiff alleged a number of factual predicates in support of his claims for intentional and negligent infliction of emotional distress.[27] He claimed that United States agents threatened him, kept him in a windowless room, photographed him naked, denied him food and

[27] The Court above granted Defendant United States' motion for summary judgment on the negligent infliction of emotional distress claim.

water, and booked him under a false name to prevent contact with his family. The United States argues that it kept him in the windowless room and took the pictures for valid law enforcement reasons; offered him food, water, and sodas; accidentially booked him under a false name and allowed him to call his family; and never threatened Plaintiff. Plaintiff appears to have conceded some of the factual predicates for his claim at the hearing.

In Texas, intentional infliction of emotional distress requires proof that "(1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the actions of the defendant cause the plaintiff emotional distress, and (4) the emotional distress suffered by the plaintiff was severe." *ITT Consumer Financial Corp. v. Tovar*, 932 S.W.2d 147, 158 (Tex. Ct. App. 1996). *See also Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993). While Defendant cites some persuasive cases on the contours of intentional infliction of emotional distress in Texas, the Court finds that a factual dispute exists regarding the activities in El Paso. Accordingly, the Court DENIES Defendant United States' motion for summary judgment on Plaintiff's eighth cause of action (intentional infliction of emotional distress) with respect to the events in Texas. While the Court above granted summary judgment with respect to Plaintiff's eighth claim arising out of the alleged events in Mexico, the Court will allow Plaintiff to present evidence regarding events in Mexico as background to Plaintiffs claims in Texas.[28]

V. Defendant Sosa's Motion for Summary Judgment

Plaintiff asserts the sale claims against Defendant Sosa as he does against Defendant United States, except those claims arise under common law or the Alien Tort Claims Act, 28

[28] Plaintiff will also be able to introduce evidence and recover for the events in Mexico, if proven, against Defendant Sosa as discussed below.

U.S.C. § 1350. Plaintiff has abandoned his second cause of action for torture against Defendant Sosa. Defendant Sosa moves or summary judgment with respect to all of Plaintiff's claims. Plaintiff also filed a motion for partial summary judgment with respect to his claims under the Alien Tort Claims Act.

A. Alien Tort Claims Act

The Alien Tort Claims Act ("ATCA") provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Congress enacted the Alien Tort Claims Act as part of the First Judiciary Act of 1789, but courts seldom invoked it until recently. The "debates that led to the Act's passage contain no reference to the Alien Tort Statute, and there is not direct evidence of what the First Congress intended it to accomplish." *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 973 F .2d 493, 498 (9th Cir. 1992) ("*Estate I*").

Despite this lack of historical guidance, several prominent opinions have provided a basis for application of the statute. *See, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The Ninth Circuit has announced that the statute requires "a claim by an alien, a tort, and a violation of international law." *Estate I*, 978 F.2d at 499. Defendant does not contest that Plaintiff's kidnapping claims meets the first two conditions. Defendant simply argues that kidnapping does not violate clearly established international law.

The Court must interpret the law of nations "not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (quoting *Filartiga*, 630 F.2d at 881). The Court finds these norms by "'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and

enforcing that law.'" *Filartiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). In order to state a cause of action under the ATCA, the norm of international law must be "specific, universal, and obligatory." *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) (citing *In re Estate of Ferdinand E. Marcos*, 25 F.3d 1467 (9th Cir. 1994) *(Estate II)*).

Plaintiff has three causes of action which depend on international norms under the ATCA: kidnapping, cruel, inhuman, and degrading treatment, and prolonged arbitrary detention.[29]

1. Kidnapping

While no United States court has ever found "kidnapping" cognizable under the ATCA, two courts have hinted at that result. *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (stating that the "illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . and it may well be a tort in violation of the 'law of nations'" but refusing to reach the issue) (citation omitted); *Jaffe v. Boyles*, 616 F. Supp. 1371, 1378 (W D.N.Y. 1985).[30] Plaintiff characterizes his claim as

[29] Plaintiff devotes much of his brief in support of summary judgment to a discussion of kidnapping. Plaintiff does not move for summary judgment on the other two grounds, but does argue that international norms prohibit Defendant Sosa's behavior under both of them. The Court observes that while a factual dispute may exist about "cruel, inhuman, and degrading treatment," if, in fact, the ATCA allows such a claim, a dispute does not exist about Plaintiffs detention. The parties agree that Defendant Sosa and others detained Plaintiff for approximately twenty four hours before delivering him to United States authorities in El Paso. The Court finds the matter of the prolonged, arbitrary detention claim ripe for summary judgment because no factual dispute exists. As discussed below, however, the Court will not rule on that issue until further discussion at the pretrial conference.

[30] In addition, the Ninth Circuit's recent recognition of prolonged arbitrary detention as a basis for a claim under the Alien Tort Claims Act, see subsection 3 below, reinforces the conclusion that kidnapping does violate

not one merely for kidnapping, but for "state-sponsored abduction within the territory of another state without its consent." Plaintiff cites a wealth of international authority[31] to support the idea that such international abduction violates both the principles of state sovereignty and an individual's right to the security of his or her person in his or her own nation.

Defendant Sosa offers a number of arguments against Plaintiff's position. First, Sosa argues that the Ninth Circuit has already rejected kidnapping as an action which violates international law in *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995). The court in *Matta-Ballesteros* faced the request to dismiss an indictment by another individual removed from his country as part of the Camarena investigation. The Ninth Circuit declined the request and stated that "kidnapping . . . does not qualify as *a jus cogens* norm, such that its commission would be justiciable in our courts even absent domestic law." *Id.* at 764 n.5. However, that footnote only means that kidnapping does not rise to the level of *jus cogens*, or the "highest status within customary international law . . . binding on all nations." *Id.* The court only made that observation to demonstrate that it need not

the ATCA. Defendant Sosa's position would require the Court to conclude that an arbitrary detention violates international law for ATCA purposes, but entering another country to kidnap one of its citizens does not.

[31] As one example, Plaintiff cites the Restatement (Third) of Foreign Relations Law of the United States section 432(2) that a "state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." Reporter's note number one to that section commented, as early as 1986, that "[n]one of the international human rights conventions to date . . . provides that forcible abduction or irregular extradition is a violation of international human rights law. However, Articles 3, 5, and 9 of the Universal Declaration of Human Rights, as well as Articles 7, 9, and 10 of the International Covenant on Civil and Political Rights might be invoked in support of such a view."

dismiss the indictment pursuant to an overrrding principle of international law. The court did not decide whether customary international law prohibited kidnapping or consider the issue with respect to the ATCA. The Court finds that *Matta-Ballesteros* provides no insight into how the Ninth Circuit would resolve this case.

Sosa next contends that a universal consenscs does not exist that kidnapping violates international law. Sosa argues that a plethora of international abductions have occurred since 1835 and that no international agreement explicitly prohibits them. Sosa then cites a number *of* student notes in law reviews which suggest that international law does not prohibit abductions. Sosa also argues that because any norm against kidnapping does not rise to the level of *jus cogens* the ATCA does not allow recovery.

Plaintiff convincingly rebuts these arguments. He suggests that the simple fact that countries have performed international abductions does not mean that such actions do not violate international law. As Plaintiff points out, torture and even genocide occur frequently, but that fact does not suggest that the international community does not universally condemn such actions. In addition, the majority *of* scholarly analysis which deals with the topic concludes that transnational abduction violates customary international law. *See. e.g.*, Abraham Abramovsky, *Extraterritorial Abductions: America's 'Catch and Snatch' Policy Run Amok*, 31 Va. J. Int' l L. 151, 204-05 (1991) (stating that "abductions remain violations *of* both international law and the law *of* the asylum country. . . . customary international law is offended"). Finally, the ATCA only requires that an international law be "specific, universal, and obligatory." It does not require the international law to rise to the level *of jus cogens*. In fact, the most recent ATCA case in the Ninth Circuit, *Martinez*, found a clear international prohibition on arbitrary arrest and

detention without any mention *of* the prohibition rising to the level of *jus cogens*. 141 F.3d at 1384.

Defendant Sosa next suggests that the principle of state sovereignty does not support Plaintiff's claim because Plaintiff does not have standing to seek redress for a violation of Mexico's territorial integrity. Plaintiff correctly rebuts this argument by pointing out that the ATCA allows a Plaintiff to assert a cause of action for any violation of international law which amounts to a tort, as long as the law is specific, universal, and obligatory, Plaintiff points out that he offers two independent sources of international law: the principles of state sovereignty and international human rights which prohibit transborder abductions.

Finally, Sosa contends that the United States has rejected the idea that transnational abductions violate international law. Sosa explains that the Executive Branch has concluded that the actions at issue here do not violate international law and that the Bilateral Extradition Treaty with Mexico allowed the abduction. The Court disagrees with both contentions. First, Sosa relies on the "Barr Opinion," issued by the Office of Legal Counsel of the United States Departmant of Justice, to suggest that the Executive Branch finds extraterritorial abductions consistent with international law. Yet the Barr Opinion discusses an entirely different issue. 1989 O.L.C. Lexis 19. That opinion reversed a prior opinion of the Office of Legal Counsel and concludes that the President and the Attorney General have the power to order the Federal Bureau of Investigation to "carry out extraterritorial law enforcement activities that contravene customary international law." *Id.* at * 1. The opinion clearly assumed that extraterritorial abduction violates customary international law-the author merely concluded that the government has the ability to decide to contravene that law. Properly read, the Barr Opinion supports Plaintiff's claim that Defendant Sosa violated international law by abducting Plaintiff in Mexico. Sosa does not contend that the President or the Attorney General made the decision

to displace international law in the case of Plaintiff's abduction.

The Court also rejects Sosa's argument that the Extradition Treaty made Plaintiff's abduction lawful. The Supreme Court did find that Plaintiff's abduction did not violate the Extradition Treaty between the United States and Mexico and refused to incorporate principles of international law into the Treaty. *United States v. Alvarez-Machain*, 504 U.S. at 669-70 (1992). Yet as Plaintiff points out, the Court only found that the abduction did not violate the Treaty, not that it did not violate customary international law. In fact, Plaintiff's counsel, points out that the Supreme Court noted at oral argument that Plaintiff did "not argue that these sources of international law provide an independent basis for the right ... not to be tried in the United States." 504 U.S. at 666.

In short, the Court concludes that "specific, universal, and obligatory" norms of international law prohibit state-sponsored, transborder abductions. The Court does not find that these norms rise to the level of *jus cogens*, but nevertheless finds them sufficiently established and articulated to support a cause of action under the Alien Tort Claims Act. Because the parties agree that Defendant Sosa conducted a transborder abduction, the Court DENIES Defendant Sosa's motion for summary judgment and GRANTS Plaintiff's motion for summary judgment with respect to Plaintiff's first cause of action (kidnapping).

2. Cruel, Inhuman, and Degrading Treatment

Defendant Sosa offers two related arguments against Plaintiffs claim for cruel, inhuman, and degrading treatment. First, Sosa suggests that even if international law recognizes a prohibition on such treatment, that prohibition is not universal and definable. Second, Sosa contends that even if subsequent case law has given specific content to the claim of cruel, inhuman, and degrading treatment, it did not exist in 1990 at the time of Plaintiffs seizure and alleged mistreatment.

Defendant Sosa relies on a case from a district court in this circuit which concluded that a plaintiff could not prevail on a claim for cruel, inhuman, and degrading treatment because of the vagueness inherent in that concept, *Ford v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (*"Ford I"*). The *Forti* court felt that without a definition of what constitutes such treatment, it could not consider the cause of action. *Ford v. Suarez-Mason*, 694 F. Supp 707, 711-12 (N.D. Cal. 1988) (*"Forti II"*).

Plaintiff responds that international law clearly prohibits cruel, inhuman, and degrading treatment, and that prohibition has content which United States courts have enforced under the Alien Tort Claims Act. *See, e.g., Jama v. INS*, 22 F. Supp. 2d 353 (D.N.J. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 186-87 (D. Mass. 1995); *Abebe-Jiri v. Negewo*, 1993 WL 814304, *4 (N.D. Ga.), *aff'd*, 72 F.3d 844 (11th Cir. 1996).[32] One of these cases, *Xuncax*, struggled with the question of the content of the international norm. 886 F. Supp. at 186 ("it is evident that the prohibition against such treatment poses more complex problems of definition than are presented by the norms forbidding torture"). The *Xuncax* court rejected the argument that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of October of 1990 provided clarity to this norm. Ultimately, the court concluded that the United States Constitution provided the answer: "any act by the defendant which is proscribed by the Constitution of the United States and by a cognizable principle of international law plainly falls within the rubric of 'cruel, inhuman or degrading treatment' and is actionable before this Court under § 1350." *Id.* at 187.[33]

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[32] The Ninth Circuit has explicitly not reached this issue but did engage in a discussion about it with respect to its status as an international norm. *Sison v. Marcos*, 103 F.3d 789, 794-95 (9th Cir. 1997).

[33] In the other cases cited above, the courts appear to reach a similar conclusion without addressing the issue. In those cases, the courts found liability under a cruel, inhuman, and degrading treatment claim in situa-

The Court agrees with the cases that link the concept of cruel, inhuman, and degrading treatment to constitutional requirements. However, while a plaintiff might sustain a claim under the ATCA for certain types of treatment, the Plaintiff in this case may not do so for two reasons. First, the Court cannot say with any certainty that a universal consensus existed regarding the content of the tort at the time of the events in this case. International law clearly prohibited cruel, inhuman, and degrading treatment before 1990, *see Restatement (Third) of Foreign Relations Law* § 702(d), but events after 1990 helped to establish its content for purposes of the ATCA.[34] Second, more importantly, the law of the case prevents Plaintiff from maintaining this cause of action. Plaintiff has pled a variety of alleged mistreatment which supports his claim for cruel, inhuman, and degrading treatment. Yet, as noted above, the Ninth Circuit has already held a prior appeal in this case that no conduct occurred in Mexico which would violate Due Process. *Alvarez*, 107 F.3d at 702. Accordingly, Plaintiff cannot raise a triable issue of fact to support a claim for cruel, inhuman and degrading treatment because that claim depends on conduct sufficient to violate the Constitution. Plaintiff has raised a triable issue of fact regarding whether or not his treatment in Mexico amounts to an assault and battery, as discussed below. The preclusive effect of the law of the case prevents his cruel, inhuman, and degrading treatment claim. The Court therefore GRANTS Defendant Sosa's motion for summary judgment with respect to Plaintiff's third cause of action.

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tions where the conduct would also have violated the standards of United States Constitution.

[34] As noted above, the Senate did not consent to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment until October of 1990, and the *Xuncax* court relied, at least in part, on that action inits decision to utilize Constitutional principles.

3. Prolonged Arbitrary Detention[35]

This circuit has recognized the "clear international prohibition against arbitrary arrest and detention" and established the right of aliens to sue on this basis under the Alien Tort Claims Act. *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998). *See also Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987), *reconsidered on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988). The Ninth Circuit in *Martinez* explained that "detention is arbitrary 'if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Id.* (citing Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. h (1987)). Nevertheless, the court rejected Martinez's claim because the authorities arrested him pursuant to law, under a valid Mexican arrest warrant, and did not detain him for a long period of time without informing him of the charges or allowing him to contact his family. *Id.*

Defendant Sosa points out that he only kept Plaintiff in custody in Mexico for approximately twenty four hoursmuch less time than the Ninth Circuit approved in *Martinez*. Plaintiff's claim does not depend on the length of his detention, however. Plaintiff points out one crucial difference from the facts of *Martinez:* in that case, Mexican authorities arrested the wrong individual pursuant to a Mexican warrant at the behest of the United States. Thus in *Martinez*, the arrest occurred lawfully, albeit mistakenly, and the detention occurred in a manner consistent with common practice. In this case, Defendant Sosa appears to have detained Plaintiff without lawful authority.[36] The Ninth Circuit deems such a

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[35] As noted above, the Court will not decide the issue of summary judgment on this ground until after a further discussion with the parties at the pretrial conference.

[36] Freed from the strictures of the Federal Tort Claims Act, the Court can find Sosa's arrest of Plaintiff in Mexico unlawful. The Court could

detention arbitrary and the Court presumes that a detention of twenty four hours without any lawful basis can establish a claim for prolonged arbitrary detention.[37] The Court thus reports its inclination to grant summary judgment in favor of Plaintiff on this claim. Nevertheless, because Plaintiff did not move for summary judgment on this basis, the Court will reserve a ruling on Plaintiff's fourth cause of action (prolonged arbitrary detention) with respect to the detention that occurred in Mexico.[38]

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not find that action unlawful for purposes of the Federal Tort Claims Act, which required a narrow examination based on California law, for the reasons discussed above. Nevertheless, the Court may consider other sources of law against Defendant Sosa, and those sources demonstrate the lawlessness of the arrest. The Court has already deemed the action "kidnapping" in violation of international law. Defendant Sosa made the arrest in Mexico without any Mexican authority to do so. Accordingly, the Court can conclude that Sosa made an unlawful detention, even though the Court could not reach that conclusion with respect to Defendant United States because of the limitations in the Federal Tort Claims Act.

[37] Plaintiff argues that Defendant Sosa should face liability for the entire time of Plaintiff's detention from seizure in Mexico through the time in the United States. Plaintiff argues that Sosa knew that the United States would detain Plaintiff domestically and thus is rsponsible for that detention. However, from the time Plaintiff entered federal custody in the United States his detention ceased to be unlawful. Thus, at that point, it appears to the Court that Plaintiff did not suffer arbitrary detention. In addition, while Plaintiff did remain in custody for a significant period of time, the traditional protections afforded to criminal defendants attached to Plaintiff and he cannot claim that his detention was unnecessarily prolonged. Accordingly, the Court is inclined to limit summary judgment in favor of Plaintiff to Plaintiff's claim for prolonged arbitrary detention by Sosa in Mexico to the point of entry into the United States.

[38] The Court also notes that Plaintiffs cause of action for kidnapping and prolonged arbitrary detention appear to overlap in this case: either provides a basis for relief for Plaintiffs removal from Mexico to the United States. The Court has not yet considered the issue of damages, but asks the parties to consider the interrelation of these causes of action before the pretrial conference.

B. Remaining Claims

Plaintiff also asserts a number of other claims against Defendant Sosa. The Court will address these in less detail given the extensive treatment of the same claims against the United States and the other individual defendants.

1. Bivens

Plaintiff asserts a the same claim under *Bivens* against Defendant Sosa as he does against the other federal defendants. Because the Court found above that no constitutional violation occurred for the "seizure" in United States airspace, Plaintiff cannot recover on this claim. Accordingly, the Court GRANTS Defendant Sosa's motion for summary judgment on Plaintiffs fifth cause of action.

2. Assault and Battery

Plaintiff seeks to recover, under a common law theory of assault and battery, for the events surrounding his seizure and transportation to the United States. Defendant Sosa argues that Plaintiff does not offer any evidence that Sosa ever touched Plaintiff in any way and that the lawful nature of the arrest immunizes the force required to actually make the arrest itself. Plaintiff counters that the nature of the events prevented Plaintiff from identifying the individuals who assaulted him and thus Sosa can still face liability for his involvement. *See Ybarra v. Spangard*, 25 Cal.2d 486 (1944). While Sosa denies ever touching Plaintiff, or having any knowledge that any other individual injured him, Sosa does admit his involvement in the seizure and his presence at the house in which Plaintiff ways he faced abuse. The Court thus finds a triable issue regarding Sosa's behavior in Mexico.[39]

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[39] The Court's conclusion that Sosa lawfully arrested Plaintiff under the law of California might prevent liability based on the actual touching involved in the arrest itself. Nevertheless, the Court feels that a triable issue exists on events in Mexico and will consider this issue again at trial.

The Court notes that the preclusive effect of the Ninth Circuit ruling does suggest that no treatment occurred in Mexico that rose to the level of a violation the Fifth Amendment. Nevertheless, a wide range of conduct falls between a mere touching and a violation of the Constitution. Accordingly, the Court DENIES Defendant Sosa's motion for summary judgment with respect to Plaintiff's sixth cause of action (assault and battery).

3. False Arrest/False Imprisonment

Plaintiff also asserts a common law claim for false arrest/ false imprisonment based on the seizure in Mexico. The Court addressed this claim above in its discussion of the Federal Tort Claims Act. The Court believes that under California law, a court would find Defendant Sosa's actions lawful due to the citizen's arrest concept embodied in the state law.[40] Accordingly, the Court GRANTS Defendant Sosa's motion for summary judgment with respect to Plaintiff's seventh/ ninth cause of action (false arrest/false imprisonment).

4. Intentional Infliction of Emotional Distress

Plaintiff asserts a claim for intentional infliction of emotional distress against Defendant Sosa based on the alleged events from the time of the seizure in Mexico to Plaintiff's delivery to Agent Berrellez in El Paso. Defendant Sosa argues that Plaintiff cannot demonstrate any evidence of

[40] Of course, if a California court looked the law of Mexico to determine the lawfulness of the seizure, that court might conclude that Sosa's actions did amount to a false arrest or false imprisonment. As discussed above, this Court could not apply the law of Mexico to find the United States liable under the Federal Tort Claims Act, but Defendant Sosa could not assert a foreign claims exception. Nevertheless, because the court believes that a California court would apply its own law, the Court does not reach this issue. In practical terms, this cause of action appears to overlap with the one for kidnapping and arbitrary detention discussed above.

outrageous conduct as required to establish such a tort. For the same reasons as in the assault and battery section above, the Court feels that Plaintiff has raised a triable issue of fact on this ground. Accordingly, the Court DENIES Defendant Sosa's motion for summary judgment on Plaintiff's eighth cause of action.

VI. Conclusion

For all the reasons outlined above, the Court: (1) DENIES Defendant Sosa's motion for substitution; (2) GRANTS Defendant Bellerez, Graden Lawn, and Waters' motion for summary judgment; (3) GRANTS Defendant Garate-Bustamante's motion for summary judgment; (4) GRANTS Defendant United States' motion for summary judgment in part and DENIES that motion in part; (5) DENIES Plaintiff's motion for partial summary judgment against Defendant United States; (6) GRANTS Defendant Sosa's motion for summary judgment in part and DENIES that motion in part; and (7) GRANTS Plaintiff's motion for partial summary judgment against Defendant Sosa in part and DENIES that motion in part; (8) RESERVES ruling on Plaintiff's claim for prolonged arbitrary detention in violation of the Alien Tort Claim Act against Defendant Sosa pending further discussion at the pretrial conference. The Court expects to proceed to trial on Plaintiff's claims of assault, battery, and intentional infliction of emotional distress against Defendant Sosa based on his alleged conduct in Mexico and on Plaintiff's claim of intentional infliction of emotional distress against the United States based on the alleged actions of its agents in El Paso.

IT IS SO ORDERED.

DATED: 3/18/99

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-56603, 00-56628

JOHN DOE I, ET AL.,
Plaintiffs-Appellees,
v.
UNOCAL CORPORATION, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
For the Central District of California

BRIEF FOR THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-56603, 00-56628

JOHN DOE I, ET AL.,
Plaintiffs-Appellees,
v.
UNOCAL CORPORATION, ET AL.
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES OF AMERICA, AS *AMICUS CURIAE*

INTRODUCTION AND SUMMARY

Pursuant to Rule 29(a), Fed. R. App. P., the United States of America hereby submits this *amicus curie* brief.

Especially in light of the numerous cases that have recently been litigated in United States courts based on the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), the United States has a substantial interest in the ATS' proper application. The ATS was enacted in 1789, as a jurisdictional provision. It ensures that federal [2] courts may entertain causes of action that are otherwise properly cognizable under the "law of nations" insofar as that law is made part of U.S. law (Art. I, Sec. 8, Cl. 10), or under "a treaty of the United States." It was an obscure provision, which was almost never invoked and which became even less relevant after the enactment of

general federal question jurisdiction and the elimination of the amount in controversy requirement.

In recent years, however, the ATS has been commandeered and transformed into a font of causes of action permitting aliens to bring human rights claims in United States courts, even when the disputes are wholly between foreign nationals and when the alleged injuries were incurred in a foreign country, often with no connection whatsoever with the United States.

In recent decisions, panels of this Court have made several fundamental analytical errors regarding the ATS. The Court has construed a statute that on its face merely confers subject matter jurisdiction as also affording an implied private right of action. Recent Supreme Court precedent, however, prohibits finding an implied private right of action in this jurisdictional grant. Moreover, it is clearly error to infer a right of action to enforce unratified or non-self-executing treaties, and non-binding United Nations General Assembly resolutions. Finally, contrary to the long-established presumption against extraterritorial application of a statute, [3] this Court has extended the causes of action recognized under the ATS to conduct occurring wholly within the boundaries of other nations, involving only foreign sovereigns or nationals, and causing no direct or substantial impact in the United States.

Under this new view of the ATS, it has become the role of the federal courts to discern, and enforce through money damage actions, norms of international law from unratified or non-self-executing treaties, non-binding United Nations General Assembly resolutions, and purely political statements. Although often asserted against rogues and terrorists, these claims are without bounds, and can easily be asserted against allies of our Nation. For example, such claims have already been asserted against foreign nationals who have assisted our Government in the seizure of criminals abroad.

See Alvarez-Machain v. *United States*, 266 F.3d 1045, 1051 (9th Cir. 2001), *vacated and rhg en banc granted*, 284 F.3d 1039 (9th Cir. 2002). This Court's approach to the ATS bears serious implications for our current war against terrorism, and permits ATS claims to be easily asserted against our allies in that war. Indeed, such claims have already been brought against the United States itself in connection with its efforts to combat terrorism. *See Al Odah* v. *United States*, 321 F.3d 1134, 1144-1145 (D.C. Cir. 2003) (ATS claims asserted by aliens detained at the U.S. Naval Base at Guantanamo Bay).

[4] Wide-ranging claims the courts have entertained regarding the acts of aliens in foreign countries necessarily call upon our courts to render judgments over matters that implicate our Nation's foreign affairs. In the view of the United States, the assumption of this role by the courts under the ATS not only has no historical basis, but, more important, raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles.

While the United States unequivocally deplores and strongly condemns the anti-democratic policies and blatant human rights abuses of the Burmese (Myanmar) military government, it is the function of the political Branches, not the courts, to respond (as the U.S. Government actively is[1]) to bring about change in such situations. Although it may be tempting to open our courts to right every wrong all over the world, that function has not been assigned to the federal courts. When Congress wants the courts to play such a role, it enacts specific and carefully crafted rules, such as in the

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[1] *See* 67 Fed. Reg. 35423 (May 16, 2002) (order continuing sanctions against Burma); Dept. of State, CONDITIONS IN BURMA AND U.S. POLICY TOWARD BURMA FOR THE PERIOD SEPTEMBER 28, 2002-MARCH 27, 2003 (http://www.state.gov/p/eap/rls/rpt/burma/19554.htm).

Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note. The ATS, which is a simple grant of jurisdiction, cannot properly be construed as a broad grant of authority for the [5] courts to decipher and enforce their own concepts of international law. Thus, respectfully, the Government asks the Court to reconsider its approach to the ATS.

STATEMENT OF THE ISSUES

In this brief, the United States will address the following issues:

1. Whether the ATS permits a court to infer a cause of action to enforce international law norms discerned by the courts from documents such as unratified and non-self-executing treaties, and non-binding UN resolutions.

2. Whether the ATS applies to claims brought by aliens relating to acts in other countries.

ARGUMENT

I. THE ATS DOES NOT PROVIDE A CAUSE OF ACTION AND DOES NOT PERMIT A COURT TO INFER A CAUSE OF ACTION TO ENFORCE INTERNATIONAL LAW NORMS DISCERNED BY THE COURTS FROM DOCUMENTS SUCH AS UNRATIFIED AND NON-SELF-EXECUTING TREATIES, AND NON-BINDING RESOLUTIONS.

A. The ATS Is Merely A Jurisdictional Provision.

1. It is a fundamental mistake to read the ATS as anything but a jurisdictional provision. *See* Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 479-480 (1986) ("any suggestion that the statute creates a federal cause of action [6] is simply frivolous"). Congress passed this statute as part of the Judiciary Act of 1789. As slightly revised today, the ATS provides:

> [T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. "The debates that led to the [Judiciary] Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended it to accomplish." *Trajano* v. *Marcos*, 978 F.2d 493, 498 (9th Cir. 1992).

This jurisdictional statute remained virtually dormant for almost 200 years, until the Second Circuit, in 1980, for the first time gave it an expansive construction. *See Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). That court held that the ATS conferred subject-matter jurisdiction on federal courts to hear a dispute between citizens of Paraguay regarding torture allegedly committed in Paraguay. The court did not opine, however, on whether the ATS itself provided a cause of action.

Thereafter, in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir.), *cert. denied*, 470 U.S. 1003 (1984), both Judges Bork and Robb disagreed with *Filartiga* insofar as it allowed such a suit to proceed. Judge Bork explained that [7] the ATS was a jurisdictional statute only and did *not* provide plaintiffs a cause of action. *Id.* at 801-823. Judge Robb stated that the *Filartiga*'s approach was "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *Id.* at 826 n.5.[2]

In *Trajano*, however, this Court held that a court in an ATS action could define and enforce the law of nations as part of its common law powers. *See Trajano*, 978 F.2d at 499-502. Three years later in, *Hilao* v. *Estate of Marcos*, 25 F.3d 1467, 1474-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995),

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[2] Judge Edwards wrote a separate opinion supporting dismissal of the ATS claim. He agreed with *Filartiga*, but believed that a torture claim could be asserted against a state actor. *Id.* at 777-798.

the Court expressly held for the first time that the ATS itself created a cause of action to enforce the "law of nations." The Court misread *Filartiga* as having so held[3] and simply followed *Filartiga* without independently examining the question.[4]

[8] The Court should now examine the issue in this en banc proceeding and should overrule *Trajano* and *Hilao* because they erroneously read the ATS as providing, or permitting a court to infer, a private right of action.

2. By its terms, the ATS vests federal courts with "original jurisdiction" over a particular type of action; it does not purport to *create* any private cause of action. An examination of the Judiciary Act of 1789 strongly supports that view. That Act in Sections 1 through 13 establishes the federal courts and delineates the jurisdiction of those courts. The ATS is set out in Section 9, adjacent to provisions establishing jurisdiction over crimes on the high seas, admiralty issues, and suits against consuls. *See* 1 Stat. 76 (1789). In context, the ATS is thus properly read as being solely a jurisdictional provision. *See* Ford, THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES, *Thomas Jefferson Papers Series 1. General Correspondence* (Dec. 3, 1792 Jefferson letter citing the "act of 1789, chapter 20, section 9" as a statute "describing the *jurisdiction of the Courts*") (emphasis added) (available at http://memory.loc.gov/ammem/mtjhtml/mtjhome.html); *cf. Montana-Dakota Co.* v. *Northwestern Pub. Serv.*, 341 U.S. 246, 249 (1951) ("The Judicial Code, in [9] vesting jurisdiction in the District Courts, does not create

[3] *See Filartiga* v. *Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984) ("We must now face the issue left open by the Court of Appeals, namely, the nature of the 'action' over which [the ATS] affords jurisdiction").

[4] The Eleventh Circuit thereafter held that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996).

causes of action, but only confers jurisdiction to adjudicate those arising from other sources").[5]

Although there is no direct legislative history regarding the ATS, many scholars agree that Congress passed this jurisdictional provision, in part, in response to two high profile incidents of the time concerning assaults upon foreign ambassadors on domestic soil (*Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (1784); *Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands*, 34 J.Cont. Cong. 109, 111 (1788)). *See, e.g.*, Casto, 18 Conn. L. Rev. at 488-498. These two cases raised serious questions of whether the then-new federal institutions would be adequate to avoid international incidents that could arise if such matters were left to the state courts. *Id.* at 490-494.

At the time, "denial of justice" to one's own citizens abroad was a justification for a country to launch a war of reprisal. E. De Vattel, THE LAW OF NATIONS, bk. II, ch. XVIII, §350, at 230-231 (Carnegie ed. trans. Fenwick 1916) (1758 ed.). For example, Edmund Randolph commented that, without an adequate federal forum, "[i]f the rights of an ambassador be invaded by any citizen it is only [10] in a few States that any laws exist to punish the offender." Letter from Edmund Randolph, Governor, Virginia, to the Honorable Speaker of the House of Delegates (Oct. 10, 1787). James Madison also feared the country's inability to "prevent those violations of the law of nations & of treaties which if not prevented must involve us in the calamities of foreign wars." 1 M. Farrand, RECORDS OF THE FEDERAL CONVENTION, 316 (1911). Notably, the protection of ambassadors is one of the

[5] As we discuss below, a court's authority to adjudicate admiralty cases by reference to non-statutory law is based upon a distinct clause of the Constitution and a unique history and background, and does not authorize a court to create causes of action to enforce international law norms under the ATS. *See* pp. 24-25, *infra*.

three classic protections afforded by the law of nations, as given effect in domestic law. William Blackstone explained that "[t]he principal offences against the law of nations as animadverted upon by the municipal laws of England are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4 W. Blackstone, COMMENTARIES, 67-68 (1783).

Article III jurisdiction is not self-vesting. Congress did not enact a general federal question statute until much later. The ATS, however, permitted the federal courts to hear one subset of "arising under" cases—*i.e.*, those arising under Acts of Congress incorporating principles of the "law of nations" into the laws of the United States or under "treaties of the United States." In this way, the First Judiciary Act ensured that the federal courts would have jurisdiction over any claim brought by an ambassador, or other alien, seeking redress for a violation of such traditional law of nations protections. Then, the next year, invoking its [11] constitutional authority to define and punish violations of the "Law of Nations," *see* Article I, Sec. 8, Cl. 10, Congress made assaults on ambassadors (as well as the two other traditional violations of the "law of nations" identified by Blackstone (piracy and violating the right of safe conduct)) offenses under the federal law. 1 Sta . 113-115, 117-118. Thus, the origins of the ATS are consistent with an understanding that it grants the federal courts subject matter jurisdiction over only those claims brought to enforce the "law of nations" insofar as that law has been affirmatively incorporated into the laws of the United States.

Under this understanding of the ATS (and Supreme Court jurisprudence regarding the recognition of causes of actions under federal law), *Congress* must enact a cause of action (or provide a basis for inferring a cause of action). Such causes of action would also fall within the present-day federal question jurisdiction (28 U.S.C. § 1331). While this interpretation may

appear to render the ATS superfluous today, it would not have been so in 1789. General federal question jurisdiction was not enacted until nearly 100 years later, in 1875, and until 1980, that jurisdictional grant contained a minimum amount-in-controversy requirement. The courts have recognized that the elimination of the amount-in-[12] controversy requirement in 1980, rendered numerous jurisdictional provisions superfluous.[6]

Accordingly, although the ATS is somewhat of a historical relic today, that is no basis for transforming it into an untethered grant of authority to the courts to establish and enforce (through money damage actions) precepts of international law regarding disputes arising in foreign countries. Moreover, as we discuss next, this Court has erred to the extent that it has permitted ATS actions to proceed based on asserted international norms stemming from documents such as unratified and non-self-executing treaties, and non-binding United Nations General Assembly resolutions.

B. Neither The ATS Itself, Nor International Law Norms, Based On Documents Such As Unratified And Non-Self-Executing Treaties, And Non-Binding UN Resolutions, Provide Any Basis For Inferring A Cause Of Action.

1. International law does not generally provide causes of action enforceable in federal court. *See Tel-Oren*, 726 F.2d at 779 ("the law of nations consciously leaves the provision of rights of action up to the states") (Edwards, J., concurring); *id.* at 810 (Bork, J., concurring). *See also* Christenson, *Federal Courts and World* [13] *Civil Society*, 6 J. Transnat'l L & Policy 405, 511-512 (1997) ("U.S. courts will not incorporate a cause of action from customary international

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[6] *See, e.g., Erienet, Inc.* v. *Velocity Net, Inc.*, 156 F.3d 513, 520 (3rd Cir. 1998) (28 U.S.C. § 1337 superfluous); *Winstead* v. *J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991) (§§ 1337, 1340, and 1343 superfluous).

law"). This Court, however, has read the ATS statute as itself providing an implied cause of action to enforce international law norms. Reading the ATS' grant of jurisdiction as a broad implied right of action cannot today be reconciled with the Supreme Court's repeated refusal in recent decisions to recognize implied private causes of action. *See, e.g., Alexander* v. *Sandoval*, 532 U.S. 275 (2001). As the Court emphasized in *Sandoval*, it has "sworn off the habit of venturing beyond Congress's intent" when it comes to recognizing implied private rights. *Sandoval*, 532 U.S. at 287. And the renunciation of that "habit" of inferring private causes of action applies equally to older statutes, such as the ATS. *Ibid.*

Under controlling Supreme Court precedent, a court must focus on whether the statute at issue has "'rights-creating' language." *Sandoval*, 532 U.S. at 288. The ATS is demonstrably a *jurisdiction*-vesting statute. Although it refers to a particular type of claim (*i.e.*, a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"), it does not purport to create any particular statutory *rights*, much less rights that in turn could be interpreted to confer a private right of action for money damages. Thus, under [14] the governing analysis established by the Supreme Court, it is plainly erroneous to construe the ATS itself as conferring a private cause of action.

2. Moreover, it is clearly improper to infer a cause of action when the documents relied upon by this Court to discern norms of international law were not themselves intended by that the Executive or Congress to create rights capable of domestic enforcement through legal actions by private parties.

Although this Court has said that violations of international law "must be of a norm that is specific, universal, and obligatory" to be actionable under the ATS, *Hilao*, 25 F.3d at 1475, the Court has not actually applied those standards.

Instead, it has found an implied right of action to enforce rights based upon international agreements that the United States has refused to join, *non*binding agreements, and agreements that are not self-executing, as well as political resolutions of UN bodies and other non-binding statements. *See, e.g., Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 714-716 (9th Cir. 1991); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998); *Alvarez-Machain*, 266 F.3d at 1051. None of these documents is "obligatory" in the sense that is critical for present purposes, because none in itself creates duties or rights enforceable by private parties in court. The Court has erroneously transformed these non-binding, non-self-executing documents —none of which [15] remotely creates a private cause of action—into sources of binding obligatory rights actionable in private suits for damages in federal court.

If the United States refuses to ratify a treaty, or regards a U.N. resolution as non-binding, or declares a treaty not to be self-executing, there obviously is no basis for a court to infer a cause of action to enforce the norms embodied in those materials. *See Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring) (to enforce such agreements "is anti-democratic and at odds with principles of separation of powers"). As to treaties or conventions not ratified by the United States, it is clearly inappropriate for the courts to adopt and enforce principles contained in instruments that the President and/or the Senate have declined to embrace as binding on the United States, or enforceable as a matter of U.S. law through judicially-created causes of action. And, where a treaty is ratified but is not self-executing (as modern human rights treaties have been declared by the President and the Senate not to be), such a treaty neither creates a cause of action nor provides rules that a court may properly enforce in a legal action brought by a private party. As the Supreme Court has held, a non-self-executing treaty "addresses itself to the political, not the judicial department; and the legislature must

execute the [treaty] before it can become a rule for the Court." *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.). *See also* RESTATEMENT [16] (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987) (emphasis added). Despite this established principle, this Court has, for example, based ATS claims on the International Covenant on Civil and Political Rights ("ICCPR"). *Martinez*, 141 F.3d at 1384; *Alvarez-Machain*, 266 F.3d at 1051-1052. That treaty is non-self-executing, *see, e.g., Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001), and therefore clearly does not itself provide a private cause of action and cannot furnish a basis for a court to infer one.[7]

Furthermore, the labeling of an international law norm, derived from unratified agreements, etc., as "*jus cogens*" violations, *see Siderman de Blake*, 965 F.2d at 714, does not grant any greater legitimacy to judicial enforcement of such norms. Like the other types of perceived international law norms mistakenly enforced by this Court under the ATS, "the content of the *jus cogens* doctrine * * * emanates from academic commentary and multilateral treaties, even when unsigned by the United States." *Sampson* v. *Federal Republic* [17] *of Germany*, 250 F.3d 1145, 1155 (7th Cir. 2001). Such sources do not authorize a court to infer a federal cause of action when the political Branches have elected not to use their powers to create one. *See* Christenson, *supra*, 6 J. Transnat'l L & Policy at 485 ("courts in the United States have uniformly rejected application of an asserted *jus cogens* norm as the sole basis for a cause of action."). *Cf. Blankenship* v. *McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999) (a *Bivens* cause of action should not be recognized where "congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees").

[7] Even where a treaty is self-executing, that fact does not necessarily mean that it provides a cause of action. Rather, it means only that the treaty is "regarded in courts of justice as equivalent to an act of the legislature." *Foster*, 27 U.S. at 314. Like an Act of Congress, a treaty may establish legal standards or rules of decision in litigation without itself creating a private right of action. *See, e.g., Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (explaining that the treaties at issue "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs," but did not "create private rights of action for foreign corporations to recover compensation from foreign states in United States courts").

This Court's approach of looking to unratified agreements to discern the "law of nations" under the ATS cannot be squared with the text of the ATS, which refers to both "treaties of the United States" and the "law of nations." The obvious import of the reference to treaties is that an international agreement must be a *ratified* treaty of the United States, receiving the advice and consent of the Senate, *before* it could be subject to enforcement in a private suit resting on the jurisdiction of the ATS (assuming further that the treaty confers a private right of action, *see* pp. 15-16 n.7, *supra*). This Court, however, has erroneously construed the ATS to imply a cause of action to enforce such norms even where the [18] Executive and Congress have declined to embody the norms in a binding or domestically enforceable law or treaty.

For example, in *Alvarez-Machain*, *supra*, a panel of this Court allowed a claim for a transborder arrest authorized by the U.S. Government even though "no international human rights instruments [even] refers to transborder abduction specifically." 266 F.3d at 1051. The panel erroneously relied upon, *inter alia*, general provisions of the Universal Declaration of Human Rights[8] (a non-binding resolution of the General Assembly of the United Nations), the American Convention on Human Rights[9] (which the Senate *refused* to

[8] G.A. Res. 218A, U.N. GAOR, U.N. Doc. A/810 (1948). Similarly, here, the panel relied upon the Universal Declaration of Human Rights.

[9] 9 I.L.M. 673 (July 4, 1977).

ratify), and the ICCPR (a non-self-executing treaty). *Id.* at 1051-1052. These documents plainly do not create domestically enforceable *rights*. A court cannot properly find enforceable rights in the American Convention on Human Rights, where the Senate has refused to ratify that convention. And even as to the ICCPR, which is a treaty, when ratified by the United States, the Senate and the Executive Branch (as it has with other modern human rights treaties[10]) expressly agreed that it would *not* be [19] self-executing and may *not* be relied upon by individuals in domestic court proceedings. *See* S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-71 (Apr. 2, 1992). It is flatly inconsistent with that decision of the political Branches for a court to infer a cause of action to enforce the terms of the agreement.

In certain areas, of course, a court, in connection with a matter already properly pending before it, may properly look to norms of international law to furnish a rule of decision, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900). That is very different from a court's inferring a cause of action as an initial matter based on international law. But even where a court may properly look to international law norms, it does so only *in the absence* of a "controlling executive or legislative act * * *." *The Paquete Habana*, 175 U.S. at 700. A ratified treaty accompanied by an express declaration that it is not self-executing is plainly such a controlling act. Similarly, the existence of a treaty or convention that has been ratified by some nations and even signed by the United States (but not

[10] In addition to the ICCPR, the Senate either expressly conditioned its consent or clearly understood that the Genocide Convention, the Torture Convention, and the Convention on the Elimination of All Forms of Racial Discrimination would not be self-executing. *See* 140 Cong. Rec. S14326 (daily ed. June 24, 1994); 136 Cong. Rec. S17491, S17486-01 (daily ed., Oct. 27, 1990); 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994); 132 Cong. Rec. S1355-01, S1378 (daily ed. Feb. 19, 1986).

yet ratified) falls in the same category, because the political Branches have taken the matter [20] fully in hand, but not yet taken the necessary steps to make the treaty binding on the United States; the treaty therefore cannot properly be relied upon in our courts as a source of the law of nations. And United Nations General Assembly resolutions are (with narrow exceptions) not binding on the member nations, and require further action by the member states before they can create any enforceable rights. *See* G. Schwarzenberger & E.D. Brown, A MANUAL OF INTERNATIONAL LAW 237 (1976). The actions or inactions of the political Branches with respect to those instruments must be deemed dispositive with respect to what effect they have on the law of nations to be applied within the United States. Thus, it is plainly wrong to infer a cause of action to enforce such documents in a suit for damages when the political Branches have elected not to do so.

3. Even beyond the general prohibition against judicial inferring of a cause of action, there are additional compelling reasons against inferring a cause of action (or creating common law causes of action to enforce international law norms) when the political Branches have not done so. In other contexts, courts refuse to infer causes of action where they implicate matters that by their nature should be left to the political Branches. *See FDIC* v. *Meyer*, 510 U.S. 471, 486 (1994). Matters that implicate international affairs are the quintessential example of a context where a court may not infer a cause of action. Permitting such [21] implied causes of action under the ATS infringes upon the right of the political Branches to exercise their judgment in setting appropriate limits upon the enforceability or scope of treaties and other documents.

The Supreme Court has long recognized that the Constitution commits "the entire control of international relations" to the political Branches. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893). *See Oetjen* v. *Central*

Leather Co., 246 U.S. 297, 302 (1918) ("[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."). It is the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" to decide the "important complicated, delicate and manifold problems" of foreign relations. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936). Because the Constitution has so committed the power over foreign affairs, the Supreme Court has strongly cautioned the courts against intruding upon the President's exercise of that authority. *See ibid.* Indeed, the Supreme Court has recognized that foreign policy are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Chicago & So. Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948).

[22] Despite this instruction from the Supreme Court, the types of claims that are being asserted today under the ATS are fraught with foreign policy implications. They often involve our courts in deciding suits between foreigners regarding events that occurred within the borders of other nations, and in the exercise of foreign governmental authority. The ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral, and legal judgment on these foreign acts. And, under this Court's approach, ATS actions are not limited to rogues and outlaws. As mentioned above, such claims can easily be asserted against this Nation's friends, including our allies in our fight against terrorism. A plaintiff merely needs to accuse a defendant of, for example, arbitrary detention to support such a claim. Indeed, that approach has already permitted an alien to sue foreign nationals who assisted the United States in its conduct of international law enforcement efforts. *See Alvarez-*

Machain, 266 F.3d at 1051.[11] As noted above, this Court's approach to the ATS therefore bears serious implications for our current war against terrorism, and permits ATS claims to be asserted against our allies in that war. Notably, such claims have already been brought against the [23] United States itself in connection with its efforts to combat terrorism. *See Al Odah* v. *United States*, *supra*.

As interpreted by this Court in previous decisions, the ATS thus places the courts in the wholly inappropriate role of arbiters of foreign conduct, including international law enforcement. Where Congress wishes to permit such suits (*e.g.*, through the TVPA), it has done so with carefully prescribed rules and procedures. The ATS contains no such limits and cannot reasonably be read as granting the courts such unbridled authority.

4. Moreover, while Congress can and has created specific offenses, such as piracy, in reference to the "Law of Nations," *see Ex Parte Quirin*, 317 U.S. 1, 30 (1942), it is error to read the ATS' reference to the "law of nations" as granting the judiciary the wholesale power, without direction from the legislature, to define and enforce customary international law through civil damage actions. There is no basis for holding that, by referencing the "law of nations" in the ATS, Congress must have intended to permit the Judicial Branch to engage in a free-wheeling exercise to develop its own views of "customary international law," based on sources that are neither law nor customary, such as unratified treaties and other non-binding documents.

[24] In some instances a court can, as we have noted, look to international law where "questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. at 700. That principle does not, however,

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[11] That ruling has, however, been vacated pending the *en banc* panel's ruling in that case.

lead to the conclusion that international law provides a private cause of action to be pursued under the ATS. Even where international law norms are considered part of federal common law (*e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964)), they do not supply a private right of action. *See Tel Oren*, 726 F.2d at 811 (Bork, J. concurring) ("[t]o say that international law is part of federal common law * * * is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief").[12]

[25] Those supporting an expansive view of the ATS might nevertheless argue that a federal court can enforce international law under the ATS just as it enforces admiralty law under its common law powers. It has been long understood, however, that "the body of admiralty law referred to in Article III did not depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution." *R.M.S. Titanic, Inc.* v. *Haver*, 171 F.3d 943, 960 (4th Cir. 2000). *See also The American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 544-545 (1828). The Framers drafted Article III with this full body of

[12] This is not to suggest that the international norms are enforceable as a part of *state* common law. Enforcement of such norms as a matter of state law would be inconsistent with the constitutional grant of responsibility over foreign affairs to the Federal Government, to the exclusion of the states. *See Zschernig* v. *Miller*, 389 U.S. 429 (1968); *Tel Oren*, 726 F.2d at 805 n.11 (Bork, J. concurring). That is especially so with respect to norms derived from ratified or unratified treaties, resolutions, and similar documents that have been relied upon in this and other suits under the ATS, for those documents are the work of the political Branches. For that reason, the absence of enforceable rights in those documents, and the refusal by the political Branches to give them enforceable domestic effect, constitute "controlling executive or legislative act[s]," *The Paquete Habana*, 175 U.S. at 700, that preclude reliance on those documents as a source of rights enforceable in a private suit for damages under state law.

maritime law "clearly in view." *R.M.S. Titanic*, 171 F.3d at 960. Thus, the reference in Article III to "all Cases of admiralty and maritime Jurisdiction" has been read as authorizing "the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction." *Id.* at 961. *See also United States* v. *Flores*, 289 U.S. 137, 148 (1933) (Section 2 of Article III "has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies").

Admiralty law is thus manifestly unique and does not support reading the ATS as granting the courts common law authority to create implied causes of action enforcing vague concepts of international law through an ATS claim. [26] Notably, there is no similar express grant in Article III for the general enforcement of the Law of Nations, as there is for admiralty law. Rather, the power to define and legislate causes of actions regarding Law of Nations offenses is assigned to Congress under Article I. *See* Art. I, Sec. 8, Cl. 10. Nor, unlike the admiralty law situation, was there a pre-constitutional history of more than 1,000 years of specialized courts enforcing international law norms relating to human rights.

C. The TVPA Also Does Not Support Inferring A Cause Of Action Under The ATS.

In embracing an expansive view of the ATS, some courts have asserted that Congress ratified *Filartiga* and its progeny when it enacted the Torture Victim Protection Act. *See* Goodman & Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463, 514 (1997). The TVPA expressly provides a cause of action for damages to persons who suffered torture at the hands of any individual acting under the law of any foreign nation. *See* 28 U.S.C. § 1350 note.

In reporting on the TVPA, the Senate Committee did observe that the TVPA would provide "an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 * * * which permits Federal district courts to hear claims by aliens for torts committed in violation of [27] the law of nations." S. Rep. 102-249 at 4 (1991). The report noted that the "*Filartiga* case has met with general approval," but also recognized that at "least one Federal judge, however, has questioned whether section 1350 can be used * * * absent an explicit grant of a cause of action by Congress." *Id.* 4-5. The report stated that the TVPA was not intended to displace Section 1350, and concluded that the latter "should remain intact." *Id* at 5. *See also* H.R. Rep. No. 102-367 at 4 (1991).

Based on these *1991* legislative statements regarding a statute enacted in *1789*, some have argued that, regardless of the best reading of the ATS or of the original validity of *Filartiga*, the TVPA evidences Congressional approval of reading the ATS to provide a cause of action. A Congressional committee statement in 1991 about the meaning of the ATS, however, is obviously of no value in discerning the intent of Congress in *1789*. In a similar context, the Supreme Court recently refused to look to legislative history from 1986 setting forth "a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier." *Vermont Agency of Natural Resources* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000). As Judge Randolph explained, "the wish expressed in the committee's statement [about the TVPA] is reflected in no language Congress enacted; it does not purport to rest on [28] an interpretation of § 1350; and the statement itself is legislative dictum." *Al Odah*, 321 F.3d at 1146 (Randolph, J., concurring).

[29] II. NO CAUSE OF ACTION MAY BE IMPLIED BY THE ATS FOR CONDUCT OCCURRING IN OTHER NATIONS.

This Court has further compounded the significance of its erroneous application of the ATS by inferring causes of actions for acts occurring within other nations. Even if the ATS could be read to imply (or permit the implication) of a cause of action, it cannot be construed to have that effect in the territory of other nations. Unless expression to the contrary is found within a federal statute, that statute is presumed to apply only within the territory of the United States, or, in limited circumstances, on the high seas. *See Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-285 (1949). This presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991). It dates back to the time the ATS was enacted. Its earliest express application by the Supreme Court is found in *United States* v. *Palmer*, 16 U.S. 610 (1818), where the Court held that a federal piracy statute should not be read to apply to foreign nationals on a foreign ship. *Id.* at 630-31.

Nothing in the ATS or in its contemporaneous history suggests an intent on the part of Congress that it would furnish a foundation for suits based on conduct occurring within other nations. Notably, the only reported cases where courts [30] mentioned the ATS after its recent enactment both involved *domestic* incidents—the capture of a foreign ship in U.S. territorial waters and seizure of slaves on a ship at a U.S. port. *See Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795). Moreover, Attorney General Bradford, while noting the availability of ATS jurisdiction for offenses on the high seas in 1795, also explained that insofar "as the transactions complained of

originated or took place in a foreign country, they are not within the cognizance of our courts." *See* 1 Op. Att'y Gen. 57, 58 (1795).[13]

As discussed above, many commentators believe that Congress passed the ATS in part to respond to two high profile incidents concerning assaults upon foreign ambassadors *on domestic soil*. *See* pp. 9-10, *supra*. Congress enacted the ATS because it wanted to ensure a federal forum so that traditional international law offenses (assaults against ambassadors and interference with the right of safe conduct) committed in this country were subject to proper redress. The point of the ATS was to *avoid* conflict with other countries.

[30] That logic does not support expanding the ATS to encompass claims arising in other nations. Other nations did not in 1789 (and certainly do not today) expect our courts to provide civil remedies for disputes between their own citizens (or involving third-country nationals) that occur on their own soil. *See* THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, Fitzpatrick, ed., Letter of George Washington to James Monroe, August 25, 1796 ("no Nation had a right to intermeddle in the internal concerns of another") (available at http://memory.loc.gov/ammem/gwhtml/gwhome.html); *United States* v. *La Juene Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (Story, J.) ("No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns"). To the contrary, litigating such disputes in this country can itself lead to objections from the foreign nations where the alleged injury occurred. "[T]hose who

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[13] *See also* 1 Op. Att'y Gen. 29, 29 (1792) ("[t]he bringing away of slaves from Martinique, the property of residents there, may be piracy, and, *depending upon the precise place of its commission*, may only be an offence against the municipal laws") (emphasis added).

drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations * * *. A broad reading of section 1350 runs directly contrary to that desire." *Tel-Oren*, 726 F.2d at 812 (Bork, J.).

[32] CONCLUSION

For the foregoing reasons, this Court's prior ATS precedents should be overruled, and this case should be remanded for application of a more limited construction of the statute.

Respectfully submitted,

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May 2003

APPENDIX G

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

July 29, 2002

Honorable Louis F. Oberdorfer
United States District Court for
The District of Columbia
333 Constitution Ave., NW
Washington, D.C. 20001

Re: *Doe, et al. v. ExxonMobile, et al.*
No. 01-CV-1357 (DDC)

Dear Judge Oberdorfer:

This is in response to your letter of May 10, in which you invite the views of the Department of State in connection with the above-captioned proceedings. Specifically, you inquire "whether the Department of State has an opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact." As you requested, this letter specifically addresses the potential adverse impacts of the litigation on U.S. interests. It does not address the legal issues before the court.

For the reasons detailed below, the Department of State believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism. It may also diminish our ability to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia.

[2] However, before describing those concerns, the Department would like to reaffirm its condemnation of human rights abuses by elements of the Indonesian armed forces in locations such as Aceh. Without expressing a view on the allegations in this specific lawsuit, we would like to reiterate that a lasting, peaceful solution to the Aceh conflict that maintains Indonesian sovereignty can only be achieved if the military and police end human rights abuses. The Department will continue to work vigorously to bring such abuses to an end through diplomatic and other means.

With respect to this litigation, it is the Department's considered opinion that adjudication at this time could adversely affect United States interests in two ways, recognizing that such effects cannot be determined with certainty.[1] First, the GOI may respond to the litigation by curtailing cooperation with the United States on issues of substantial importance to the United States. Second, the litigation's potential effects on Indonesia's economy could in turn adversely affect important United States interests.

Potential Bilateral Effects

In our experience, the government and people of Indonesia react most negatively to any perceived intrusion into areas of Indonesian sovereignty. We anticipate that adjudication of this case will be perceived in Indonesia as a U.S. court trying

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[1] Much of this assessment is necessarily predictive and contingent on how the case might unfold in the course of litigation. E.g., the nature, extent, and intrusiveness of discovery; the degree to which the case might directly implicate matters of great sensitivity to the Government of Indonesia and call for judicial pronouncements on the official actions of the GOI with respect to the conduct of its military activities in Aceh; the effect that a decision in favor of plaintiffs might encourage secessionist activities in Aceh and elsewhere in Indonesia; whether the case were to go to a jury and, if so, whether a substantial monetary award were to be imposed on Exxon Mobil; how other large commercial interests might interpret such a judgment when making investment decisions in Indonesia.

the GOI for its conduct of a civil war in Aceh. All of the human rights abuses and injuries alleged in the complaint refer to conduct claimed to have been committed by the military and police forces of the GOI. This issue presents special sensitivities for Indonesia because it is deeply concerned about maintaining national cohesion in the face of strong anti-government secessionist movements in Aceh and elsewhere. The [3] Indonesian response to such perceived U.S. "interference" in its internal affairs could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform.

This lawsuit could potentially disrupt the on-going and extensive United States efforts to secure Indonesia's cooperation in the fight against international terrorist activity. Indonesia is the fourth largest state in the world, with a population of some 210 million. It is also the largest Muslim nation, and serves as a focal point for U.S. initiatives in the ongoing war against Al Qaida and other dangerous terrorist organizations. U.S. counter-terrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests.

The United States also is actively seeking to assist Indonesia in reform efforts aimed at ending the kinds of abuses alleged in this litigation. Through improved training and support of security personnel, as well as judicial reform, these programs are designed to establish a higher degree of professionalism, and respect for individual rights. Should the GOI withdraw from these programs in reaction to the litigation, it will impact adversely on our goal of improving Indonesia's treatment of all members of its population, including the people of Aceh. An adverse effect on our human rights objectives is also possible if the GOI were to turn down U.S. companies bidding for new contracts in

response to the suit. Working side-by-side with U.S. firms, Indonesian companies and government agencies see the advantages of modern business practices including transparency, respect for contracts, fair labor practices, anti-corruption, efficiency, and competitiveness. We would expect that foreign companies, such as from the People's Republic of China (CNOOC and PetroChina both acquire multi-million dollar rights to Indonesian oil and gas fields this year), would be far less concerned about human right abuses, or about upholding best business practices.

Potential Effect on Indonesia's Stability

Economic and political stability in Indonesia is important to U.S. interests in the region. Given Indonesia's large population, resources, key geographic [4] location, and proximity to key U.S. allies, instability there could create problems ranging from interruption in vital shipping lanes, to refugee outflows, to a new home for terrorists. To the extent this litigation contributes to a worsening of the economic conditions in Indonesia that breed instability it would adversely affect U.S. interests.

Here, timing is an important consideration, because there is already substantial evidence that Indonesia's foreign investment climate is deteriorating. The GOI's Investment Coordinating Board (BKPM), for example, reported that foreign direct investment approvals dropped 88 percent in the first quarter of 2002 (US$ 291.5 million) compared to the first quarter of 2001 (US$ 2.44 billion). Total BKPM foreign direct investment approvals for 2001 also dropped 41.5 percent from the previous year. While the dollar value of investment proposals may be inflated and many proposals do not necessarily result in actual projects, the magnitude of the change confirms that the underlying trend is worsening.

This litigation appears likely to further discourage foreign investment, particularly in extractive industries in remote or

unstable areas that require security protection. This, in turn, could have decidedly negative consequences for the Indonesian economy. Revenues from the oil and gas sector, for example, are one of the core contributors to GOI budget revenues, comprising 35 percent of the Indonesian Government's total revenues in 2001. In the last few years, oil and gas revenues (including taxes on the sector) have become an increasingly important source of government funds, comprising 19, 23, and 31 percent of total government revenue respectively in 1998, 1999, and 2000. In addition, oil and gas revenues, which are received in U.S. dollars, offer important protection for the GOI from foreign exchange risk. However, in order to maintain its current level of revenues from the sector, Indonesia must develop new fields, or invest further to maintain production at existing oil and gas fields. More generally, Indonesia must maintain a growing economy to deal with the effects of the 1997-98 financial crisis, which left the GOI with the costs of a Rp 660 trillion (US$ 75 billion) bank bailout. Efforts by the U.S. and other donors to enhance Indonesia's fiscal sustainability thorough debt rescheduling and international lending programs will be undermined if Indonesia cannot sustain its own commitments.

[5] A viable, well-funded central government is also important to U.S. interests in domestic Indonesian policies. Providing more and higher quality public services, especially education and health services, is a key factor in reducing poverty and maintaining political stability. Given its size and large population, any threat to Indonesia's political stability could impact on the security of U.S. treaty allies Australia and Thailand, as well as other countries in the region. Adequate government resources are also necessary to maintain properly trained and equipped security forces that do not need to rely on unregulated and often corrupt business dealings, practices which contribute to actions outside of a central chain of command. Professional personnel are also crucial for making progress on a host of U.S. priorities,

including promoting regional stability, countering ethnic and sectarian violence, combating piracy, trafficking of persons, smuggling, narcotics trafficking, and environmentally unsustainable levels of fishing and logging. Litigation in the U.S. that discourages further investment in Indonesia poses a risk of weakening the Indonesian economy in conflict with these U.S. goals.

In this respect, we note that increasing opportunities for U.S. business abroad is an important aspect of U.S. foreign policy. Under the circumstances presented here, the adjudication of these claims could prejudice the Government of Indonesia and Indonesian businesses against U.S. firms bidding on contracts in extractive and other industries.

For the information of the Court, I am enclosing a copy of a letter received on July 15, 2002, from Indonesia's Ambassador to the United States Soemadi Djoko M. Brotodiningrat to Deputy Secretary of State Richard Armitage. In the letter Ambassador Soemadi expresses his government's objections to the continued adjudication of this case. He states that Indonesia views this litigation as an unacceptable extraterritorial act that will complicate efforts to safeguard foreign investors and will [6] negatively impact Indonesia's struggle to secure economic recovery. He also states that the case will have an adverse impact on effort towards peace in Aceh, which is at an extremely sensitive stage.

Sincerely,

/s/ William H. Taft
WILLIAM H. TAFT, IV
The Legal Advisor

Enclosure:
Letter from Indonesian Ambassador

Supreme Court, U.S.
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(3)

No. 03-339

In the Supreme Court of the United States

JOSE FRANCISCO SOSA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN SUPPORT OF THE PETITION

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36 pp

QUESTIONS PRESENTED

The Alien Tort Statute (ATS), 28 U.S.C. 1350, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The questions presented are:

1. Whether the ATS creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdiction-granting provision that does not establish private rights of action.

2. Whether, to the extent that the ATS is not merely jurisdictional in nature, the challenged arrest in this case is actionable under the ATS.

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In the Supreme Court of the United States

No. 03-339

JOSE FRANCISCO SOSA, PETITIONER

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HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN SUPPORT OF THE PETITION

Pursuant to Rule 12.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully submits this response in support of the petition for certiorari in No. 03-339, seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-108a) is reported at 331 F.3d 604. The initial panel opinion of the court of appeals (Pet. App. 109a-139a) is reported at 266 F.3d 1045. The March 18, 1999 (Pet. App. 176a-219a) and

[1] The Solicitor General has authorized the United States to file a separate petition for certiorari from the court of appeals' decision in this case, raising additional questions concerning respondent Alvarez-Machain's claims in this case against the United States. The United States' petition cannot raise the questions presented by petitioner Sosa because those issues arise from the judgment entered only against petitioner Sosa and not from the claims against the United States. On August 27, 2003, Justice O'Connor granted the United States' application for an extension of time within which to file such a petition to and including October 1, 2003.

May 18, 1999 (Pet. App. 172a-175a) orders and the September 9, 1999 judgment (Pet. App. 140a-171a) of the district court are not yet reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on June 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1985, DEA Special Agent Enrique Camarena-Salazar was abducted by members of a Mexican drug cartel and brought to a house in Guadalajara, Mexico, where he was tortured and murdered. Eyewitnesses placed respondent Humberto Alvarez-Machain, a Mexican citizen and a medical doctor, at the house while Camarena-Salazar was tortured. Pet. App. 4a.

In 1990, a federal grand jury indicted Alvarez-Machain for the torture and murder of Camarena-Salazar. The DEA attempted to obtain Alvarez-Machain's presence in the United States through informal negotiations with Mexican officials. *United States* v. *Alvarez-Machain*, 504 U.S. 655, 657 n.2 (1992). After those negotiations proved unsuccessful, DEA approved the use of Mexican nationals to take custody of Alvarez-Machain in Mexico and transport him to the United States. Thereafter, several Mexican nationals, including petitioner Sosa, acting at the behest of the DEA, seized plaintiff from his office in Mexico, and in less than 24 hours transported him to the United States. Pet. App. 4a-5a.

Alvarez-Machain moved to dismiss the federal indictment against him, arguing that he could not be forced to stand trial in the United States on the ground that his seizure from Mexico was contrary to international law and a United States treaty with Mexico. This Court rejected that argument, holding that Alvarez-Machain's arrest "was not in violation of the Extradition Treaty," *Alvarez-Machain*, 504 U.S. at 670, and that, regardless of whether the arrest violated international law, he could be tried in this country "for violations of the criminal laws of the United States," *ibid.* The case was remanded for a trial, which took place in 1992. At the close of the government's case, the district court granted Alvarez-Machain's motion for acquittal. Pet. App. 6a.

2. In 1993, after returning to Mexico, Alvarez-Machain brought this civil action in the United States District Court for the Central District of California, asserting tort claims against the United States, federal DEA officials, petitioner Sosa, and certain unnamed Mexican civilians. The complaint sought, *inter alia*, to hold the United States liable for false arrest under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), 2671-2680, and petitioner Sosa and the individual federal defendants liable under the Alien Tort Statute (ATS), 28 U.S.C. 1350. The district court substituted the United States for the individual federal defendants and dismissed Alvarez-Machain's FTCA claims against the United States. In addition, the court granted summary judgment for Alvarez-Machain on his ATS claims against petitioner Sosa, reasoning that recovery was available because, the court believed, Alvarez-Machain's arrest and detention violated international law. The court held that Alvarez-Machain could recover damages under the ATS only for his detention in Mexico and, after a trial, entered a $25,000 damages award against petitioner Sosa. Pet. App. 6a-7a.

3. Alvarez-Machain and petitioner Sosa filed separate appeals. In September 2001, the court of appeals affirmed in part and reversed in part. Pet. App. 109a-139a. Among other things, the court affirmed "the district court's judgment with respect to [petitioner] Sosa's liability under the [ATS]." *Id.* at 139a. In so holding, the court concluded that Alvarez-Machain's "detention was arbitrary and, therefore, violated the 'law of nations.'" *Id.* at 119a. In addition, the court reversed the district court's dismissal of Alvarez-

Machain's FTCA claims against the United States and held that Alvarez-Machain could sue the United States for the tort of false arrest. *Id.* at 139a.

4. The court of appeals granted rehearing en banc, withdrew the initial panel's decision, and, by a 6-5 majority, issued a decision that reached the same result as the initial panel. Pet. App. 1a-108a. The court affirmed "the judgment with respect to [petitioner] Sosa's liability under the [ATS]" and "reverse[d] and remand[ed] the district court's dismissal of the FTCA claims against the United States." *Id.* at 64a.

a. In considering Alvarez-Machain's ATS claim, the en banc court reaffirmed the circuit's prior case law addressing "the scope of the [ATS]" and "delineat[ing] [its] contours." Pet. App. 9a-10a; see *id.* at 8a-14a. In particular, the en banc court explained, the Ninth Circuit has "resolved that the [ATS] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." *Id.* at 10a. Furthermore, drawing from the Ninth Circuit's prior case law, the court rejected as too "restrictive" petitioner's argument "that only violations of *jus cogens* norms, as distinguished from violations of customary international law, are sufficiently 'universal' and 'obligatory' to be actionable as violations of 'the law of nations' under the [ATS]." *Id.* at 11a.

Applying that understanding of the ATS, the en banc court held that an "arbitrary" extraterritorial arrest is an actionable violation of international law under the ATS. In finding that "there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention," the court pointed in particular to provisions of the Universal Declaration of Human Rights (Universal Declaration), G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948), the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A, 21st Sess., U.N. Doc. A/6316 (1966), and to the Restatement (Third) of Foreign Relations.

See Pet. App. 25a-26a & n.18. Furthermore, the court concluded that respondent's arrest was arbitrary, and thus an actionable violation of the law of nations under the Ninth Circuit's understanding of the ATS, because, the court held, the arrest was not authorized by United States or Mexican law. See *id.* at 29a-44a.

b. Judge O'Scannlain, joined by Judges Rymer, Kleinfeld, and Tallman, dissented. Pet. App. 72a-96a. Judge O'Scannlain found "astounding" the majority's decision "divin[ing] the entitlement to recovery from the [ATS]" based on the alleged violation of international law in this case. *Id.* at 73a. Although he assumed that some violations of international law may be actionable under the ATS, Judge O'Scannlain concluded that "no claim can prevail where the United States, through its political branches, does not acquiesce in an international norm." *Id.* at 74a-75a; see *id.* at 80a. In Judge O'Scannlain's view, a "norm" of international law "to which the political branches of our government have refused to assent is not a universal norm [that is actionable under the ATS]" and "[i]t is not the judiciary's place to enforce such a norm contrary to their will." *Id.* at 81a.

Judge O'Scannlain concluded that Alvarez-Machain's claim for damages under the ATS for arbitrary arrest is not actionable under the ATS. As he explained, "[e]xamining the relevant statutes, the actions of the political branches in other circumstances, and * * * the manner in which the President and the Senate have exercised the treaty power in this area," there is "only one conclusion: The United States does not, as a matter of law, consider itself forbidden by the law of nations to engage in extraterritorial arrest, but reserves the right to use this practice when necessary to enforce its criminal laws." Pet. App. 86a-87a (footnote omitted). Regarding the claimed private right of action, Judge O'Scannlain observed that the ICCPR "was signed and ratified in 1992 but with the understanding by the

Senate and Executive Branch that Articles 9 and 10 are not self-executing and may not be relied on by individuals" and the political branches have refused to recognize that the Universal Declaration creates "binding legal obligations." *Id.* at 87a n.12. Moreover, Judge O'Scannlain explained, "the DEA was well within its delegated powers [under domestic law] when arresting Alvarez." *Id.* at 92a.

In Judge O'Scannlain's view, "[t]he decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make." Pet. App. 96a. As he explained, the political branches, "unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security." *Ibid.* Moreover, Judge O'Scannlain observed, the majority's decision in this case has important implications for the "international war on terrorism." *Id.* at 72a.

c. Judge Gould separately dissented. Pet. App. 97a-108a. In his view, "this case presents a nonjusticiable political question requiring scrutiny of an executive branch foreign policy decision." *Id.* at 97a. As he explained, "by holding that federal courts can review for compliance with international law executive branch decisions to act against foreign nationals on foreign soil, the majority transforms the executive branch's foreign policy decisions into occasions for judicial review." *Id.* at 104a. Moreover, Judge Gould emphasized, such judicial review "allows the fear of tort lawsuits to taint officials' already complicated foreign policy analysis" and "prevents our government from speaking with a single voice on an important foreign policy decision." *Id.* at 103a-104a.

ARGUMENT

The Court should grant the petition and resolve the threshold questions presented concerning the proper scope and application of the ATS. Although the ATS was scarcely used throughout the first two hundred years of the Nation's history, ATS claims have proliferated in the past few decades. With increasing frequency, and as exemplified by the divided en banc court of appeals' decision in this case, lower courts have struggled over the meaning and scope of the ATS. There is sharp disagreement over whether the ATS is merely a grant of jurisdiction or, instead, not only confers jurisdiction but also establishes a private right of action. That issue has profound separation-of-powers implications and serious consequences for both the development and expression of the Nation's foreign policy. Among courts that have concluded that the ATS creates a cause of action, there also is widespread disagreement over what types of international-law-based claims are actionable. The potential impact of this case on the actions of the Executive abroad is great and further heightened by the Nation's ongoing war against terrorism. Under the decision below, the ATS may serve as an instrument for litigants seeking judicial supervision of and monetary sanctions on the appropriateness of actions taken by this Nation and its allies in foreign lands.

This case also presents an important question concerning the authority of domestic law enforcement authorities to conduct arrests abroad. By holding that the statute authorizing arrests by DEA agents precludes agents from enforcing United States law extraterritorially—including those laws that by their very terms have extraterritorial effect—the en banc Ninth Circuit's decision in this case threatens the government's ability to conduct necessary law enforcement operations abroad in its efforts to combat terrorism, international crime, and the flow of illegal drugs into the

United States. The Solicitor General has therefore authorized the United States to file a separate petition for certiorari seeking review of the judgment in this case, raising that issue. That petition is due October 1, 2003.

A. The Questions Presented Are Exceptionally Important

The ATS states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. 1350. The provision was enacted in 1789 as part of the first statute passed by Congress on the judiciary, Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76, and, although it has been amended in certain nonsubstantive respects, has remained largely unchanged for the past 215 years. For most of its history the ATS has existed as an obscure provision of the United States Code, a "legal Lohengrin," *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.), which was invoked only on a few occasions, and which became even less relevant after the enactment of general federal question jurisdiction in 1875. Act. of Mar. 3, 1875, ch. 137, § 1, 18 Stat. (Pt. 3) 470.

That changed in 1980. In *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the first court of appeals' decision to expound on the ATS at length, the Second Circuit held that the ATS authorized a damages action brought in federal court involving a dispute between citizens of Paraguay regarding torture allegedly committed in Paraguay. As the Second Circuit itself has recently recognized, in the wake of the *Filartiga* decision, "[q]uestions surrounding the purpose and scope of the [ATS]" have "attract[ed] substantial judicial attention." *Flores* v. *Southern Peru Copper Corp.*, No. 02-9008, 2003 WL 22038598, at *6 (2d Cir. Sept. 2, 2003); see *id.* at *6-*10. As explained in Part B, *infra*, those questions have engendered controversy in the lower courts. Indeed, in

the past few decades, the ATS has been transformed by lower courts from a rarely invoked statutory provision into a prodigious font of litigation involving efforts by aliens to bring claims for alleged violations of their human rights in the United States courts, even with respect to events that are entirely extraterritorial, like the alleged violations in *Filartiga*.

In addition, as the court of appeals' decision in this case illustrates, some lower courts have inferred from the jurisdictional provision of the ATS a right of action on behalf of aliens to enforce in the United States courts not only alleged violations of self-executing treaties, but also violations of non-self-executing and unratified treaties, and even non-binding resolutions of the United Nations General Assembly. That interpretation of the ATS has thrust the federal courts into an unprecedented role of defining what principles of customary international law are privately enforceable in the United States and effectively binding the United States to treaties or resolutions to which the Executive Branch has declined to accede. As Judge Randolph recently observed, "[t]o have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Al Odah* v. *United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (concurring opinion), petition for cert. pending, Nos. 03-334 & 03-343 (filed Sept. 2, 2003).

The use of the ATS by aliens to seek relief for violations of international law by foreign actors or others in foreign lands also has immediate foreign policy consequences for the United States and its allies. Although ATS claims are often asserted against rogues or human-rights abusers, the claims are not limited to such defendants and may also be asserted against allies of our Nation. In this case, for example, respondent has asserted ATS claims against a foreign national

who assisted the United States in the seizure abroad of an indicted criminal. When courts issue judgments in connection with such ATS litigation concerning the extent to which alleged acts do or do not violate the law of nations, they threaten the fundamental constitutional principles that reserve to the political branches the authority to make judgments about how to conduct the Nation's foreign affairs and that seek to ensure that the Nation speaks with one voice on such matters. See *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2386-2387 (2003); see also *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). Indeed, even the en banc court below observed that "international human rights litigation under the [ATS] inevitably raises issues implicating foreign relations." Pet. App. 18a; see note 9, *infra*.

The threshold question presented by petitioner Sosa is whether the ATS is a grant of subject matter jurisdiction or, instead, also creates a private cause of action. That issue is properly presented by this case. In an earlier appeal, petitioner Sosa argued that, although the ATS confers jurisdiction, it does not "create a substantive, federal right like the [Torture Victim Protection Act]." *Alvarez-Machain* v. *United States*, 107 F.3d 696, 703 (9th Cir. 1996), cert. denied, 522 U.S. 814 (1987). The Ninth Circuit rejected that argument and held that the ATS "has a substantive as well as jurisdictional component." *Ibid.* In addition, as noted above, in resolving the instant appeal, the en banc court specifically reaffirmed that the Ninth Circuit has "resolved that the [ATS] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." Pet. App. 10a. Furthermore, the question whether the ATS creates *any* private right of action is logically anterior to the question on which the en banc court divided below, *i.e.*, whether the alleged violation of international law in this case is actionable under the ATS.

This case therefore presents a timely and appropriate vehicle for this Court to provide vitally needed guidance on the scope of the ATS.

B. The Lower Courts Are Divided Over The Scope Of The ATS

Nearly two decades ago, in the District of Columbia Circuit's fractured opinion in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (1984), cert. denied, 470 U.S. 1003 (1985), Judge Edwards observed that this "area of law * * * cries out for clarification by the Supreme Court." *Id.* at 775 (concurring opinion). As the Second Circuit recounted in *Flores* just three weeks ago, after the petition here was filed, the controversy in the lower courts "regarding the meaning and scope of the [ATS]" has only deepened since *Tel-Oren*. *Flores*, 2003 WL 22038598, at *10. Indeed, the *Flores* court stressed that the disagreement over the meaning of the ATS raises "complex and controversial questions" that "can be resolved only by Congress or the Supreme Court." *Ibid.*[2]

a. As discussed, in *Filartiga*, the Second Circuit allowed an ATS action to proceed involving a dispute between citizens of Paraguay regarding torture allegedly committed in Paraguay. The Second Circuit has stated that, "[b]y allowing the plaintiffs' claim to proceed, the *Filartiga* Court not only held that the [ATS] provides a jurisdictional basis for

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[2] This Court has not addressed the scope of the ATS. The underlying claim in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), was brought under the ATS, and the United States filed an amicus brief in support of the petitioner in *Hess*, which argued, *inter alia*, that "the Alien Tort Statute (like the federal question statute) is only jurisdictional in nature" and therefore "does not create a cause of action in favor of an alien for a violation of the law of nations." U.S. Br. 13 n.11. However, this Court decided *Hess* on the ground of foreign sovereign immunity and therefore did not consider the scope of the ATS. See 488 U.S. at 434-435.

suit, but also recognized the existence of a private right of action *for aliens only* seeking to remedy violations of customary international law or of a treaty of the United States." *Flores*, 2003 WL 22038598, at * 6; see *Kadic* v. *Karadzic*, 70 F.3d 232, 241-244 (2d Cir. 1995), cert. denied, 518 U.S. 1004 (1996); *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001).[3]

b. Four years after *Filartiga*, in *Tel-Oren*, the District of Columbia Circuit issued a fractured decision exploring the ATS. In *Tel-Oren*, the survivors and relatives of persons murdered and injured by a terrorist attack in Israel by the PLO brought ATS claims in the District Court for the District of Columbia. The court of appeals affirmed the dismissal of those claims, but each member of the panel stated "different reasons for affirming th[at] result." 726 F.2d at 775 (per curiam). Judge Bork concluded that the ATS is a purely jurisdictional statute and does not provide the plaintiffs a cause of action or a substantive right to sue for violations of international law. *Id.* at 801-811. He further concluded that neither the treaties cited by plaintiffs in that case, nor international law by itself, conferred on plaintiffs a cause of action. *Id.* at 816. In addition, Judge Bork observed that "[w]hat little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations" and, Judge Bork stated, "[a] broad reading of section 1350 runs directly contrary to that desire." *Id.* at 812.

[3] The *Filartiga* court did not specifically opine on whether the ATS itself created a private cause of action, but, as noted, the Second Circuit has recently stated, in reviewing its case law, that "*Filartiga* * * * recognized the existence of a private right of action." *Flores*, 2003 WL 22038598, at * 6.

Judge Robb did not reach the question of whether the ATS is merely jurisdictional or instead creates a private cause of action. Rather, in his view, the proper resolution of the case lay in holding that the plaintiffs' ATS claims were "nonjusticiable" under "the political question doctrine." *Tel-Oren*, 726 F.2d at 823. In so holding, however, Judge Robb observed that the Second Circuit's decision in *Filartiga* is "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *Id.* at 826 n.5. As he explained, the *Filartiga* court "failed to consider the possibility that *ad hoc* intervention by courts into international affairs may very well rebound to the decisive disadvantage of the nation. A plaintiff's individual victory, if it entails embarrassing disclosures of this country's approach to the control of the terrorist phenomenon, may in fact be the collective's defeat." *Ibid.*[4]

c. The Ninth Circuit was the next circuit to address the ATS. In *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (1992), cert. denied, 508 U.S. 972 (1993), the court of appeals held that a court in an ATS action may define and enforce the law of nations as part of its common law powers. See *id.* at 499-503. Three years later in *Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1474-1476 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995), that same court of appeals held that the ATS is not merely jurisdictional but instead also creates a cause of action to enforce the "law of nations." As discussed above, the Ninth Circuit reaffirmed that understanding of the ATS in its en banc decision in this case. See Pet. App. 10a.[5]

[4] Judge Edwards agreed with the Second Circuit's decision in *Filartiga*, but concluded that a torture claim may only be asserted against a state actor. *Tel-Oren*, 726 F.2d at 775-798.

[5] The Ninth Circuit is currently considering en banc the panel's decision in *Doe I* v. *Unocal Corp.*, Nos. 00-56603 & 00-56628 (argued June 16, 2003). In that case, residents of Myanmar (Burma) brought an ATS

d. The Eleventh Circuit has joined the Second Circuit and the Ninth Circuit and has held that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira* v. *Negewo*, 72 F.3d 844, 848 (11th Cir.), cert. denied, 519 U.S. 830 (1996).

e. More recently, in *Al Odah* v. *United States*, *supra*, the District of Columbia Circuit rejected ATS claims asserted against the United States by the next-friends of aliens detained at the U.S. Naval Base at Guantanamo Bay. The court of appeals unanimously held that, under *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), aliens outside the United States had no right to sue in United States courts regarding their detention under any jurisdictional theory. The *Al Odah* decision accordingly did not reach or address any issues concerning the nature of scope of the ATS. In a separate concurrence, however, Judge Randolph reiterated the position expressed by Judge Bork in *Tel-Oren*, that the ATS

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action against a California corporation (Unocal) and the Myanmar military government. The plaintiffs alleged that they were subjected to forced labor, murder, rape, and torture in connection with the construction of a pipeline in Myanmar. The district court granted summary judgment for Unocal on the ATS claims, finding that plaintiffs could not show that Unocal acted under color of law or otherwise participated in abuses committed by the military government. 110 F. Supp. 2d 1294 (C.D. Cal. 2000). The Ninth Circuit reversed, holding that Unocal could be held liable under the ATS on the theory, which the panel derived from its assessment of customary international law, that Unocal aided and abetted the Myanmar military government in committing forced labor, murder, and rape (but not torture). 2002 WL 31063976 (Sept. 18, 2002). The Ninth Circuit vacated the panel's decision and set the case for en banc consideration. 2003 WL 359787 (Feb. 14, 2003). The United States filed an amicus brief in support of Unocal in the en banc proceeding, arguing, *inter alia*, that the Ninth Circuit should revisit its ATS case law and hold that the ATS does not create a private right of action, but instead is merely jurisdictional. See Pet. App. 220a-249a. On May 9, 2003, the United States submitted a copy of its *Unocal* brief to the en banc court in this case.

"does not create a cause of action," and the one by Judge Robb in *Tel-Oren*, "that *Filartiga* is 'fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *Al Odah*, 321 F.3d at 1146 (citing *Tel-Oren*, 726 F.2d at 801 (Bork, J.); 726 F.2d at 826 n.5 (Robb, J.)).[6]

Judge Randolph reasoned that the ATS provides the courts with jurisdiction, but does not confer a cause of action. As he explained, under the United States Constitution, "Congress—not the Judiciary—is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts." *Al Odah*, 321 F.3d at 1147. Moreover, Judge Randolph observed that, "[t]o hold that the [ATS] creates a cause of action for treaty violations, as the *Filartiga* decisions indicate, would be to grant aliens greater rights in the nation's courts than American citizens enjoy. Treaties do not generally create rights privately enforceable in the courts. Without authorizing legislation, individuals may sue for treaty violations only if the treaty is self-executing." *Id.* at 1146.

In *Flores*, after discussing the opinions in *Tel-Oren* and *Al Odah*, the Second Circuit stated that "the law of the District of Columbia Circuit stands in contrast to that of our Circuit and of the other Circuits that have followed our holding in *Filartiga*." 2003 WL 22038598, at *8. To be sure, no decision of the District of Columbia Circuit has commanded a single rationale for rejecting *Filartiga* (and the panel declined to reach the ATS issue in *Al Odah*). However, a majority of the court in *Tel-Oren* did reject *Filartiga* (albeit for different reasons). And, as the Second Circuit recognized in *Flores*,

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[6] Although Judges Garland and Williams did not join Judge Randolph's concurring opinion, "they d[id] not intend thereby to express any view about its reasoning." *Al Odah*, 321 F.3d at 1145 n*. Rather, they believed that the issues addressed by Judge Randolph did not need to be reached. *Ibid.*

the District of Columbia Circuit's case law "stands in contrast to" the expansive interpretation of the ATS that has been adopted by the circuits following *Filartiga*. Moreover, because many of the suits brought under the ATS involve wholly foreign activities without any nexus to a particular circuit, plaintiffs have substantial latitude in avoiding the District of Columbia Circuit and, in practice, have channeled ATS claims to circuits that have embraced *Filartiga*.

The importance of the questions presented concerning the ATS, and the fact that the case law discussed above substantially fleshes out the competing positions on the scope of the ATS that have been adopted by the lower courts, counsel against waiting for a more concrete circuit conflict to materialize, while plaintiffs continue to file ATS suits in the Second and Ninth Circuits that implicate potentially sensitive foreign affairs issues.

C. The Ninth Circuit's Resolution Of Alvarez-Machain's ATS Claim Is Fundamentally Flawed

The en banc court's conclusion that Alvarez-Machain "has established a violation of the law of nations that is actionable under the [ATS]," Pet. App. 71a, is the product of several different legal errors, including, perhaps foremost, the en banc court's threshold determination that the ATS supplies anything more than a grant of jurisdiction. *Id.* at 10a.

1. The plain language, placement in the United States Code, and history of the ATS strongly suggest that the provision only establishes subject matter jurisdiction over a particular class of suits, and does not create a private right of action. By its terms, the ATS vests federal courts with "original jurisdiction" over a particular type of action; it does not purport to *create* any private cause of action. An examination of the Judiciary Act of 1789 strongly supports that view. Sections 1 through 13 of the Act established the federal courts and delineated the jurisdiction of those courts.

1 Stat. 73-81. The ATS is set out in Section 9, adjacent to provisions establishing jurisdiction over crimes on the high seas, admiralty issues, and suits against consuls. See 1 Stat. 76. The ATS is thus naturally read, like those related provisions, as being solely a jurisdictional provision and, indeed, that is how it was viewed at the time of its creation. See Opinion on Fugitive Slaves (Dec. 3, 1792), in 6 *The Writings of Thomas Jefferson* 142 (Paul Leicester Ford, ed., 1895) (opinion of Sec'y of State Jefferson) (citing the "act of 1789, chapter 20, section 9" as a statute "describing the *jurisdiction of the Courts*") (emphasis added); see also *Montana-Dakota Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951) ("The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources").

That construction of the ATS is also consistent with what is known of its origins. Although there is no direct legislative history regarding the ATS, the available evidence indicates that Congress passed this jurisdictional provision, in part, against the background of two high profile incidents of the time concerning assaults on foreign ambassadors on domestic soil (*Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Terminer 1784); *Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands*, 34 J. Cont. Cong. 109, 111 (1788)). These two cases raised serious questions of whether the then-new federal institutions would be adequate to avoid international incidents that could arise if such matters were left to the state courts. See William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490-494 (1986).

The jurisdiction granted to the fledgling federal courts by Article III of the Constitution was not self-vesting. And Congress did not enact a general federal question statute

until nearly 100 years later. The ATS, however, permitted the federal courts to hear one subset of "arising under" cases —*i.e.*, cases arising under Acts of Congress incorporating principles of the "law of nations" into the laws of the United States, under Acts of Congress executing treaties, or under "treaties of the United States." The Judiciary Act of 1789 thereby ensured that the federal courts would have jurisdiction over any claim brought by an ambassador, or other alien, seeking redress for a violation of such laws.

Furthermore, a year after passing the first Judiciary Act, Congress invoked its authority under Article I, Section 8, Clause 10 of the Constitution to define and punish violations of the "Law of Nations," and made assaults on ambassadors (as well as the two other traditional violations of the "law of nations" identified by Blackstone) statutory offenses under federal law. Act of Apr. 30, 1790, ch. 9, §§ 8-13, 25-28, 1 Stat. 113-115, 117-118; see 4 William Blackstone, *Commentaries on the Laws of England*, 68 (1769) ("The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy."). Thus, the origins of the ATS are consistent with an understanding that it grants the federal courts subject matter jurisdiction over only those claims brought to enforce the "law of nations" insofar as that law has been affirmatively incorporated into—*i.e.*, "animadverted on" by—the laws of the United States. The action of the First Congress, in adopting the three traditional concepts from the law of nations into the positive law of the United States, demonstrates that Congress knows how to do so when it wishes. In this case, there is no such Act of Congress defining the law of nations to include the alleged international "norms" on which Alvarez-Machain relied, much less creating a private right of action for a violation of such norms.

Under this understanding of the ATS, a plaintiff must show that *Congress* has enacted a cause of action to establish an actionable claim under the ATS, just as a plaintiff must point to an "unambiguously conferred right" (*Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002)) to maintain an action under 42 U.S.C. 1983. Such a cause of action would also fall within the present-day federal question jurisdiction (28 U.S.C. 1331). While this interpretation may appear to render the ATS superfluous today, it would not have been so in 1789, or even in 1979. General federal question jurisdiction was not enacted until nearly 100 years later, Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, and until 1980, that jurisdictional grant contained a minimum amount-in-controversy requirement, Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369. Until 1980 therefore, the ATS ensured that efforts to sue ambassadors, even if involving insubstantial monetary amounts, would be cognizable in federal court. The courts have recognized that the elimination of the amount-in-controversy requirement in 1980 rendered numerous jurisdictional provisions superfluous. See, *e.g.*, *Erienet, Inc.* v. *Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998); *Winstead* v. *J.C. Penney Co.*, 933 F.2d 576, 580 (7th Cir. 1991). In the case of the ATS, however, at the very time that Congress obviated the specific need for the little used ATS, the *Filartiga* court provided it with a fundamentally misconceived and problematic new role.

2. The Ninth Circuit's reading of the ATS as a broad grant of implied rights of action not only does not square with the statute's text and history, it cannot be reconciled with this Court's repeated refusal in recent decisions to recognize implied private causes of action in the absence of a clear congressional intent to create such rights. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275 (2001); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61 (2001); *FDIC* v. *Meyer*,

510 U.S. 471, 483-486 (1994). Indeed, in *Sandoval*, this Court emphasized that it has "sworn off the habit of venturing beyond Congress's intent" when it comes to recognizing implied private rights. 532 U.S. at 287. And the renunciation of that "habit" of inferring private causes of action applies equally to newly minted as well as older statutes, such as the ATS. *Ibid.*

As this Court has admonished, in determining whether Congress has created a private cause of action, a court must focus on whether the statute at issue has "'rights-creating' language." *Sandoval*, 532 U.S. at 288. No "'rights-creating' language" is set forth in the ATS and, indeed, by its own terms, the ATS is a *jurisdiction*-vesting provision. Although it refers to a particular type of claim (*i.e.*, a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"), the ATS does not purport to create any particular statutory *rights*, much less rights that in turn could be interpreted to confer a private right of action for money damages.

The Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, underscores that Congress knows how to create an express cause of action for the violation of international law when it wants to. That Act explicitly creates a private cause of action on behalf of both aliens and non-aliens who have suffered acts of torture at the hands of an individual acting under color of law of a foreign nation. See 28 U.S.C. 1350 note. The Act, moreover, carefully specifies the nature of actionable violations, legal standards, and statute of limitations governing the cause of action. Under the Ninth Circuit's construction of the ATS, the TVPA was entirely unnecessary for alien claimants.[7]

[7] To be sure, the House Report on the TVPA states that the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into the rules of customary international law." H.R. Rep. No. 367, 102d Cong., 1st Sess., Pt. 1, at 4 (1991); see S. Rep. No. 244, 102d Cong., 1st Sess., at 4-5 (1991). But a statement in a committee report is not a law. Moreover, whatever weight a court may give such legislative history in the context of interpreting the statute accompanying the report *i.e.*, the TVPA, it is entitled to little if any weight in interpreting a statute, like the ATS, enacted by a *prior* Congress.

3. Even assuming that the ATS is not merely jurisdictional and creates a cause of action for some violations of international law, the Ninth Circuit in this case clearly erred in inferring a cause of action under the ATS for violation of non-binding international agreements that indisputably were not intended by the President or Congress to create rights capable of domestic enforcement through legal actions by private parties.

a. The Ninth Circuit has an established practice of inferring rights of action to enforce rights based on international agreements that the United States has refused to join, *non*-binding agreements, and agreements that are not self-executing, as well as political resolutions of United Nations bodies and other non-binding statements. See, *e.g.*, Pet. App. 25a-26a; *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 714-716 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383-1384 (9th Cir. 1998). In this case, for example, the court found an actionable violation of international law under the ATS based on provisions of the Universal Declaration, *supra*, a non-binding resolution of the General Assembly of the United Nations; the American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, to which the Senate *refused* to give its consent; and the ICCPR, *supra*, a non-self-executing treaty. See *Flores*, 2003 WL 22038598, at *25 n.35; *Al Odah*, 321 F.3d at 1147 (Randolph, J., concurring). In ratifying the ICCPR (as well as other human rights treaties), the Senate and the Executive Branch expressly agreed that the ICCPR would not be self-executing so it could not be relied on by individuals in domestic court

proceedings. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-8071 (1992). Other courts of appeals uniformly have recognized that the ICCPR is neither self-executing nor enforceable through jurisdiction granting provisions such as the habeas corpus statute.[8]

If the political branches of the United States refuse to ratify a treaty, or regard a United Nations resolution as non-binding, or declare a treaty not to be self-executing, there is no basis for a court to infer a cause of action to enforce the norms embodied in those materials. See *Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring). The Second Circuit recently rejected the Ninth Circuit's practice of looking to such documents to discern the "law of nations" in an ATS case. See *Flores*, 2003 WL 22038598, at *19-*20. Judge Cabranes explained that non-binding General Assembly declarations "are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations." *Id.* at *19. More fundamentally, as Judge Randolph explained in *Al Odah*, looking to an unratified treaty or human rights agreement to establish rules of law "is anti-democratic and at odds with principles of separation of powers." 321 F.3d at 1148 (concurring).

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[8] See *Flores*, 2003 WL 22038598, at *25 n.35 (citing cases); *Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001); *United States ex rel. Perez* v. *Warden*, 286 F.3d 1059, 1063 (8th Cir.), cert. denied, 537 U.S. 869 (2002); *Beazley* v. *Johnson*, 242 F.3d 248, 267-268 (5th Cir.), cert. denied, 534 U.S. 945 (2001); *Igartua De La Rosa* v. *United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam), cert. denied, 514 U.S. 1049 (1995); see also *Al Odah*, 321 F.3d at 1147 (Randolph, J., concurring). In addition to the ICCPR, the Senate either expressly conditioned its consent or clearly understood that the Convention on the Elimination of All Forms of Racial Discrimination, the Torture Convention, and the Genocide Convention would not be self-executing. See 140 Cong. Rec. 14,326 (1994); 136 Cong. Rec. 36,198 (1990); 132 Cong. Rec. 2350 (1986).

Similarly, when a treaty is ratified but is not self-executing (as the President and Senate have characterized modern human rights treaties), the treaty neither creates a cause of action nor provides rules that a court may properly enforce in a legal action brought by a private party even when jurisdiction exists. As this Court has held, a non-self-executing treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (Marshall, C.J.), overruled on other grounds, *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51 (1833). The untenable result of the Ninth Circuit's approach is to transform non-binding, non-self-executing documents—materials that are not even the result of the very constitutionally proscribed legislative process that has produced statutes from which this Court has *refused* to infer a private right of action, see, *e.g.*, *Gonzaga Univ.*, 536 U.S. at 283 (emphasizing that a federal statute must contain an "unambiguously conferred right" for suit to lie under 42 U.S.C. 1983)—into virtually boundless sources of private rights actionable under the ATS.

Moreover, as Judge Randolph observed, permitting courts to recognize such private rights of action under the ATS not only contradicts this Court's sworn refusal to infer private rights from duly enacted statutes that do not specifically grant such rights, but it creates another anomaly—it would "grant aliens greater rights in the nation's courts than American citizens enjoy," since by its terms the ATS applies only to suits brought by aliens. *Al Odah*, 321 F.3d at 1146 (concurring). There is no basis whatever to conclude that the Congress that enacted the ATS—only a few years removed from the war that secured the Nation's independence—intended to create such a counter-intuitive regime.

b. To be sure, in certain areas, courts, in connection with matters already validly pending before them, have looked to

norms of international law to furnish a rule of decision. See, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900). That practice, however, is fundamentally different from a court inferring a cause of action as an initial matter based on international law. As the District of Columbia Circuit has recognized, international law does not generally provide causes of action enforceable in federal court. See *Tel-Oren*, 726 F.2d at 780 n.4 ("the law of nations consciously leaves the provision of rights of action up to the states") (Edwards, J., concurring); *id* at 810 (Bork, J., concurring). But even where a court may properly look to international law norms, it does so only *in the absence* of a "controlling executive or legislative act." *The Paquete Habana*, 175 U.S. at 700. A ratified treaty accompanied by an express declaration that it is not self-executing is plainly such a controlling act. Similarly, the existence of a treaty or convention that has been ratified by some nations and even signed by the United States (but not yet ratified) falls in the same category, because the political branches have taken the matter fully in hand, but not yet taken the necessary steps to make the treaty binding on the United States; the treaty therefore cannot properly be relied on in our courts as a source of the law of nations. And United Nations General Assembly resolutions are (with narrow exceptions) not binding on the member nations, and require further action by the member states before they may create any enforceable rights. See Georg Schwarzenberger & E.D. Brown, *A Manual of International Law* 233 (1976). The actions or inactions of the political branches with respect to those instruments thus implicate the political question doctrine in that the actions of the political branches must be deemed dispositive as to what effect they have on the law of nations to be applied within the United States. See Pet. App. 97a.

4. Other considerations also compel against inferring a cause of action under the ATS (or creating common law

causes of action to enforce international law norms) when the political branches have not done so. In other contexts, courts refuse to infer causes of action where they implicate matters that by their nature should be left to the political branches. See *FDIC* v. *Meyer*, 510 U.S. at 486. Few matters are more directly committed to the political branches than the management of the Nation's foreign affairs. See *Garamendi*, 123 S. Ct. at 2386; *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319, 320 (1936). Indeed, the Constitution expressly gives to Congress, and not the courts, the power to "define and punish * * * Offenses against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10. Permitting courts to imply causes of action under the ATS from the unbounded reaches of customary international law directly infringes on the textually grounded constitutional responsibility of the political branches to exercise their judgment in setting appropriate limits on the enforceability or scope of treaties and other international legal principles. Cf. *Baker* v. *Carr*, 369 U.S. 186, 217 (1962) (judicial interference is particularly unwarranted when matter is textually committed to another branch); see also Pet. App. 98a-99a.

So too, under the expansive interpretation adopted by the Ninth Circuit, ATS litigation is fraught with foreign policy implications and the potential for interference with the exercise of constitutional responsibilities by the political branches. Under that theory, ATS actions would often involve the judiciary in deciding suits between foreigners regarding events that occurred within the borders of other nations, and in the exercise of foreign governmental authority. The ATS cannot properly be construed to permit suits requiring United States courts to pass factual and legal judgment on these foreign acts.[9]

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[9] Recently, for example, the South African government responded to ATS litigation seeking reparations for human rights abuses during the

Moreover, under plaintiffs' approach, ATS actions are not limited to suits against rogues and outlaws. Such claims can easily be asserted against this Nation's allies, including those supporting this Nation's fight against terrorism. In this case, for example, the court has permitted an alien to sue foreign nationals who assisted the United States in its conduct of international law enforcement efforts. The court of appeals' expansive interpretation of the ATS thus places the judiciary in the wholly unfamiliar and constitutionally inappropriate role of second-guessing political decisions regarding how the United States should respond to conduct in foreign lands or carry out international law enforcement. The profound risks threatened by such a regime are alone a sufficient ground to grant certiorari.

5. Even if the ATS could support inference of a cause of action in some instances, the court of appeals erred in inferring that it applies extraterritorially as well. Absent reason to conclude otherwise, statutes are generally presumed to apply only within the territory of the United States, or, in limited circumstances, on the high seas. See *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-285 (1949). Nothing in the ATS, or in its contemporaneous history, suggests that Congress intended it to apply to conduct in foreign lands. To the contrary, the ambassador assaults that preceded the ATS, see p. 17, *supra*, and the only reported cases in which courts mentioned the ATS soon after its enactment involved *domestic* incidents—the capture of a foreign ship in U.S. territorial waters and seizure of slaves on a ship at a U.S. port. See *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). Moreover, Attorney General Bradford, while noting the availability of ATS jurisdiction for certain offenses on the high seas in 1795, also explained that insofar "as the transactions complained of originated or took place in a *foreign country*, they are not within the cognizance of our courts." See 1 Op. Att'y Gen. 57, 58 (1795) (emphasis added).

It also bears emphasis that, as discussed above, the ATS is only a jurisdiction-vesting statute, which itself does not apply extraterritorially. Properly understood, a cause of action for extraterritorial actions would depend on a statute that both creates a cause of action and makes sufficiently clear that it applies extraterritorially. Here, of course, the Ninth Circuit inferred a cause of action in the absence of a statutory cause of action, and even many of the materials it relied on, such as the ICCPR, do not impose extraterritorial commitments. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (the typical presumption against extraterritorial application "has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility").

As discussed above, the ATS was enacted to *avoid* strife with other countries. That objective does not support expanding the ATS to encompass claims arising in other nations. Other nations did not in 1789 (and certainly do not today) expect our courts to provide civil remedies for disputes between their own citizens (or involving third-country nationals) that occur on their own soil. To the contrary,

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apartheid regime. A September 10, 2003 press release issued by the South African Government stated: "I wish to confirm that the South African Government is of the view that the litigation should be halted. It is of this view because it believes that the issues of reparations is an issue which affects South Africans and should be dealt with by South Africans, if necessary, in South African courts * * * . We do not believe that the goodwill which exists in South Africa and the partnerships which have developed to deal with the past should be jeopardised by the litigation in New York." Ltr. from Minister Penuell M. Maduna to Judge John E. Sprizzo, Exh. 1 (Sept. 11, 2003) (on file in *In re South African Apartheid Litig.*, MDL No. 1499 (S.D.N.Y. filed Sept. 11, 2003)).

litigating such disputes in this country can itself lead to objections from the foreign nations where the alleged injury occurred. That construction, moreover, would open the door to claims that U.S. activities abroad violate international law, which, if allowed under the ATS, would put courts in the role of arbitrating the exercise of the foreign affairs power that the Constitution textually commits to the political branches. That is all the more reason to doubt that the first Congress ever imagined that the ATS would be construed to open the United States courts to the sort of potentially divisive ATS litigation that has proliferated in the United States courts in the 23 years since the Second Circuit decided *Filartiga*.

D. The Ninth Circuit Erred In Holding That Alvarez-Machain's Arrest Was Not Authorized By United States Law

The en banc court's ruling against petitioner Sosa is also predicated on its holding that the arrest was not authorized under United States law. Pet. App. 44a. Notwithstanding its expansive interpretation of the ATS, even the en banc court recognized that there could be no liability under the ATS for "arbitrary" arrest and detention if the arrest and detention were taken pursuant to United States law. *Id.* at 29a. As the United States will explain in detail in its own petition for certiorari in this case, see note 1, *supra*, Alvarez-Machain was properly indicted and arrested under federal statute. The ATS claim brought against petitioner Sosa fails for that reason as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Respondents.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October Term, 2003
No. 03-339

Supreme Court of the United States

Francisco Sosa.,

Petitioner,

vs.

Humberto Alvarez-Machain,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Humberto Alvarez-Machain submits this brief in opposition to the petition for a writ of certiorari filed by petitioner Francisco Sosa. Petitioner, with the support of the United States, seeks review of a well-reasoned, factually unique ruling by the Ninth Circuit Court of Appeals sitting *en banc*, which correctly applied the applicable law upon which the circuit courts of appeal are not divided. Significantly, the Court has repeatedly denied *certiorari* in cases raising the very issues identified by Petitioner and the Government. The case presents no "compelling reason" for review under SUP. CT. R. 10. and is not a suitable vehicle for addressing the Respondent's or the Government's broad concerns.

STATEMENT OF THE CASE

A. Introduction

Respondent Humberto Alvarez-Machain opposes the petition for a writ of certiorari because the decision below is correct as a matter of law and warrants no further review. Contrary to Petitioner's and the Government's assertions, there is no split among the circuit courts on any of the issues presented in the petition.

Enacted in 1789 as part of the First Judiciary Act, the Alien Tort Claims Act ("ATCA") provides: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[1] As shown below, since *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), the ATCA has been interpreted to establish subject matter jurisdiction and a cause of action for serious violations of international law, including violations of human rights norms. Congress squarely endorsed *Filartiga* and extended its reach from aliens to U.S. citizens in the Torture Victim Protection Act of 1992 ("TVPA"), 28 U.S.C. § 1350 note, denying in the

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[1] 28 U.S.C. § 1350. The term "law of nations" was used until the early 20th century in reference to the customary rules and obligations that regulated interaction between states and certain aspects of state interaction with individuals. It has now been supplanted by the term "customary international law." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 Introductory Note (1987) ("RESTATEMENT (THIRD)").

process that a legislative cause of action was required before ATCA proceedings were appropriate.

Petitioner and the Government stress their concerns about the use of the ATCA in other contexts, such as corporate complicity in human rights violations and the war on terrorism, but these concerns are pretextual. The case involves no corporate defendant and no issue involving corporate responsibility. Nor does the case concern the war on terrorism or any other war. It arises out of the transborder abduction of a criminal suspect from Mexico to the United States, authorized and orchestrated by low-level government officials and carried out by private Mexican citizens who acted without legal authority. This case does not involve the authority of the President or cabinet officials to override international law to protect the national security of the United States. Nor does it address the authority of any U.S. agency other than the Drug Enforcement Agency ("DEA") to engage in extraterritorial arrests and other law enforcement activities or anti-terrorist activities. Certainly, if Congress wished to provide DEA agents with extraterritorial arrest authority, it could do so. But in the absence of that legislative directive, this Court can allow the *en banc* decision of the Ninth Circuit to stand without compromising the ability of the United States government to defend itself. The courts have well-developed doctrines and techniques for screening out frivolous, vexatious, or politically-charged cases when appropriate.

What is at stake in this case is the rule of law. Basic principles dating back to the Magna Carta, enshrined in our Constitution and recognized in international human rights law, prohibit this kind of abuse of official authority, and there can be little doubt that the decision below was right in finding

abuse on these facts: hiring former police officials in a foreign country to seize a criminal suspect in the middle of the night and secretly transporting him hundreds of miles to a foreign country without any legal authority or authorization constitutes arbitrary arrest and detention under international and domestic law. Though the factual setting is unique, it is unexceptional that the ATCA would be available to enforce human rights standards with such a distinguished pedigree.

Petitioners' first question – whether the ATCA provides a cause of action or is jurisdictional only – raises an issue which has been raised repeatedly by defendants in ATCA cases for two decades and which has been rejected by every court to rule upon the issue. This Court has repeatedly denied *certiorari* petitions raising this issue.

Similarly, there is no conflict in the circuits regarding petitioner's second question – whether ATCA lawsuits are limited to violations of *jus cogens* norms. No court has required a *jus cogens* norm for ATCA purposes, and every court to consider Petitioner's argument has rejected it. It is unnecessary for this Court to take on a complex and somewhat esoteric issue in the absence of some clarifying analysis and disagreement among the lower courts.

Petitioner's third question – whether respondent's arbitrary arrest and detention constitutes a tort in violation of international law – is similarly without controversy. There can be no dispute that international law prohibits arbitrary arrest and detention, and that the U.S. fully supports this norm. This case appears to be the first reported U.S. decision applying this norm in this specific context, but the application of the international prohibition on arbitrary arrest and

detention is clear in these circumstances, as determined by the courts at both the trial and the appellate levels. This issue standing alone certainly does not warrant review in this Court.

B. Proceedings Below

Respondent was abducted at gunpoint by petitioner and his co-conspirators from his medical office in Guadalajara, Mexico, in April 1990. His kidnappers were private Mexican citizens acting without legal authority. He was transported to a nearby city, held overnight, and flown to El Paso, Texas, the next day where he was handed over to waiting DEA agents. Respondent challenged the district court's jurisdiction and moved to dismiss his indictment, arguing *inter alia*, that his abduction was a violation of the U.S.-Mexican extradition treaty. Ultimately, this Court rejected Respondent's treaty argument. *United States v. Alvarez-Machain* , 504 U.S. 655 (1992). Respondent went to trial in November 1992, and on December 14, 1992, the district judge granted a motion of acquittal under FED. R. CRIM. P. 29.

Respondent filed this action on July 9, 1993, seeking damages for his April 1990 abduction, *inter alia*, under the ATCA. Petitioner moved to dismiss the case and also to substitute the United States as a defendant under the Westfall Act for any claims Respondent made against him, including the ATCA claims at issue in this petition. Petitioner's motion for substitution was denied, and Petitioner did not appeal from that ruling. The ATCA claims against all the other individual defendants were substituted under the Westfall Act and became claims against the United States under the

Federal Tort Claims Act ("FTCA"). The district court and the court of appeals decided that Respondent could not maintain ATCA claims against federal officials, and that disposition is not before this Court.

The district court granted Respondent's summary judgment motion with respect to his ATCA claims against Petitioner. In the same ruling, the district court granted the summary judgment motion filed by the United States dismissing Respondent's FTCA claims. Subsequently, the trial court held a bench trial on damages and entered a judgment of $25,000 in compensatory damages against Petitioner based on his violation of Respondent's right not to be subjected to arbitrary arrest and detention and his right not to be subjected to transborder abduction.

Both parties appealed to the United States Court of Appeals for the Ninth Circuit. A panel of the Ninth Circuit affirmed the district court's judgment against Petitioner under the ATCA and reversed the district court's FTCA ruling and remanded to the district court for further proceedings on those claims. The panel affirmed the judgment against Petitioner on the grounds that transborder abduction and arbitrary arrest and detention violated the law of nations. The Ninth Circuit agreed to rehear the appeal *en banc* and, on June 3, 2003, affirmed the judgment against Petitioner.

The *en banc* majority found that Respondent's abduction constituted arbitrary arrest and detention. Simultaneously, the *en banc* court also rejected Respondent's argument that transboundary abduction violates the "law of nations" and is actionable under the ATCA. The *en banc* court did so even though the international authorities contrary

to its decision are uniform and powerful, and the authoritative RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, rightly provides that "a state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." *Id.*, at § 432(2). Respondent maintains his contention, as found by the district court and by the Ninth Circuit panel, that state-sponsored transborder abduction of this kind violates the law of nations and comes within the ATCA.

REASONS FOR DENYING THE WRIT

I. The Circuit Courts Have Uniformly Held that the Alien Tort Claims Act Provides a Basis for Relief for Torts Committed In Violation of the Law of Nations.

A. The Courts Are Not Divided on the Circumstances Under Which Liability Under the ATCA Is Appropriate.

Petitioner urges this Court to grant *certiorari* because the Second, Ninth and Eleventh Circuits have allegedly implied a cause of action under the ATCA erroneously. Pet. Br., at 8-11. But the courts' analysis in the relevant cases is consistent with this Court's jurisprudence and the intent of Congress. There is no conflict among the circuit courts.

We start, as Petitioner does, with *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), in which the Second Circuit ruled that the ATCA establishes subject matter jurisdiction and a cause of action for serious violations of

international law, including violations of human rights norms. The Second Circuit found explicitly that ATCA was available only when an alien alleged violations of "well-established, universally recognized norms of international law." *Id.*, at 888. The rationale for so high a standard was perfectly clear: "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding on them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law." *Id.*, at 881. As noted subsequently by the Second Circuit, "*Filártiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for non-judicial discretion." *Kadic v. Karadzic*, 70 F.3rd 232, 244 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996). The Second Circuit has adhered unwaveringly to this standard for over twenty years,[2] allowing

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[2] *See, e.g., Flores v. Southern Peru Copper Corp.*, 2003 WL 22038598, at *10 (2d Cir. Aug. 29, 2003); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983 (*per curiam*). As the government points out, Gov. Br., at 18, the *Flores* court noted that "the law of the District of Columbia Circuit stands in contrast to that of our Circuit and of the other circuits that have followed our holding in *Filartiga*", 2003 WL 22038598, at *8. The government also concedes as it must that the D.C. Circuit has never issued a majority opinion in conflict with *Filartiga*, and that a "contrast" between the law of numerous circuits on the one hand and concurrences in a single circuit on the other

cases that clear the high threshold of "well-established, universally recognized norms of international law"and dismissing cases that do not.

Since *Filártiga, every* circuit court of appeals and *every* federal district court to address and resolve the issue has applied a substantially identical standard, never expressing disagreement with *Filártiga*'s underlying principles. To the contrary, when norms of this sort are found to have been violated, the ATCA provides both subject matter jurisdiction and a cause of action.

The Ninth Circuit Court of Appeals, for example, has consistently agreed with *Filartiga* and held that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).[3] The Eleventh and Fifth Circuit Courts of Appeals have adopted the same standard. *Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir.), *cert. denied*, 519 U.S. 830 (1996); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999). Because these courts have never expressed any disagreement with the Second Circuit, even citing the Second Circuit's precedents with approval, it is frivolous to argue that there is difference between the Second Circuit's phrasing ("well-established, universally recognized

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does not a circuit split make.

[3] *Accord, Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998); *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002); *Trajano v. Marcos*, 978 F.2d 493, 498-503 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

norms of international law") and the Ninth Circuit's phrasing (the norm must be "specific, universal, and obligatory") requiring intervention by this Court. The inquiry in all of the ATCA cases has been whether the plaintiff is relying on a norm which satisfies the accepted and rigorous tests for determining a customary norm.[4]

The fact is that, since 1980, federal courts in seven circuits have reaffirmed *Filártiga* and its underlying principles,[5] and none has disagreed with its standards (though

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[4] The Supreme Court has repeatedly established the criteria for determining the content and applicability of the law of nations in domestic litigation when Congress has not addressed the international standard. The touchstone is *The Paquete Habana*, 175 U.S. 677 (1900), where the Court stated:

> International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators . . . .

Id., at 700.

[5] *Filártiga* has been followed, *inter alia*, by circuit and/or district courts in: (i) *First Circuit*: *see, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 178-83 (D. Mass. 1995); (ii) *Second Circuit*: *see, e.g., Kadic v. Karadzic, supra*; (iii) *Third Circuit*: *see, e.g., Iwanowa v. Ford Motor Company*, 67 F.

several have dismissed cases that did not establish a violation of international law). Not even the D.C. Circuit's fractured decision in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (*per curiam*), *cert. denied*, 470 U.S. 1003 (1985), cited prominently by Petitioner and by the Government, created a conflict with *Filartiga*. In *Tel-Oren*, the panel (Edwards, Bork and Robb, JJ.) divided three ways in refusing to *extend* the *Filártiga* holding to a claim of terrorism against the Palestine Liberation Organization, but nowhere did it state a holding conflicting with *Filártiga*. In fact, Judges Edwards and Bork were careful to point out that their reading of the ATCA did not conflict with the decision of any other circuit, including *Filártiga*. *See Tel-Oren*, 726 F.2d at 790-91 (Edwards, J); *id.* at 819-20 (Bork, J.). In the nearly twenty years since *Tel-Oren*, not a single court has found its contradictory opinions to be persuasive authority, much less that it created a conflict demanding *certiorari* review. Nothing in the recent lone opinion of Judge Randolph in *Al Odah v. United States*, 321 F.3rd 1134, 1148

Supp.2d 424, 438-41 (D.N.J. 1999); (iv) *Fifth Circuit*: *see, e.g., Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999); (v) *Ninth Circuit*: *see, e.g., Alvarez-Machain v. United States*, 96 F.3d 1246 (9th Cir. 1996), *amended by* 107 F.3d 696, 702-703 (1997), *cert. denied*, 522 U.S. 814 (1997); *In re Estate of Marcos*, 25 F.3d 1467, 1472-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Trajano v. Marcos*, 978 F.2d 493, 498-503 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993)); (vi) *Eleventh Circuit*: *see, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir.), *cert. denied*, 519 U.S. 830 (1996); (vii) *D.C. Circuit*: *see, e.g., Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 7-8 (D.D.C. 1998).

(D.C. Cir. 2003). (Randolph J., concurring), alters the reality that there is no conflict among the circuits on this interpretation of ATCA.

B. The Coherent Jurisprudence of the Courts Under the ATCA Is Correct as a Matter of Law.

There is good reason that no circuit split exists on the issue of whether the ATCA both establishes subject matter jurisdiction and in narrow circumstances recognizes a cause of action: the argument to the contrary is inconsistent with the plain language of the statute and the decisions of this Court. By its terms, the statute covers (i) "*any* civil action," (ii) by an "alien" plaintiff, (iii) suing for a "tort," (iv) "in violation of" international law in either customary or treaty form. Assuming that the plaintiff is an alien, the statute is satisfied so long as the underlying wrong takes tortious form and is in violation of international law. There is no additional requirement that Congress "implement" customary international law or that the case "arises under" federal law. *Cf.* 28 U.S.C. § 1331.

In *Hilao, supra*, the Ninth Circuit carefully examined the ATCA and distinguished it from other jurisdictional statutes:

> [I]n contrast to section 1331, "which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action." *Tel-Oren v. Libyan Arab Republic*, [726 F.2d 774, 779] (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). It is unnecessary that international law provide a specific right to sue. International law "does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions." *Id.*, at 777-78 (quoting L. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 224 (1972)). "Nothing more than a violation of the law of nations is required to invoke section 1350." *Id.* at 779.

On the basis of its careful examination of the ATCA's text, relevant case law, and other statutory provisions, the Ninth Circuit concluded that the ATCA "creates a cause of action for violations of specific, universal and obligatory international human rights standards . . . ." *Hilao*, 25 F.3d at 1475. In this case, the *en banc* decision adopts the same approach.

This analysis is consistent with the understanding of eighteenth-century courts, as suggested by the first reported case involving the ATCA, *Bolchos v. Darrel*, 3 Fed. Cas. 1810 (D.S. Car. 1795), in which the plaintiff sought restitution for the value of slaves on a captured Spanish ship. The court made no mention of any additional Congressional action needed to allow the plaintiff to invoke substantive rights under the law of nations. Those rights already existed in American law by virtue of the incorporation of the law of nations into the common law of the United States.[6] "[T]he First Congress understood that torts in violation of the law of nations would be cognizable at common law, just as any other

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[6] 1 James Kent, COMMENTARIES ON AMERICAN LAW 195 (13th ed. 2001).

tort would be"[7] and that the courts of the fledgling nation should be open to aliens seeking a remedy for violations of international law. Contemporaneous statements by the Attorney General reaffirmed the status of the ATCA as the basis for an alien's suit to enforce international norms.[8]

In addition, the Petitioner's and the Government's position rests on a bizarre anachronism. The very notion of a "cause of action" entered the legal lexicon of this country almost 60 years after the adoption of the ATCA. It only

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[7] William S. Dodge, "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'," 19 HASTINGS INT'L & COMP. L. REV. 221, 239 (1996).

[8] In 1795, for example, the U.S. Attorney General was asked to consider the potential liability of U.S. citizens who had aided the French in attacking the British colony in Sierra Leone. The opinion, only six years removed from the adoption of the First Judiciary Act, reveals that the First Congress understood that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be:

> ... there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States.

1 *Op. Att'y Gen.* 57, 59 (1795) (emphasis in original). *See also* 26 *Op. Att'y Gen.* 250, 253 (1907) ("I repeat that the statutes thus provide a forum and a right of action.").

"became a legal term of art when the New York Code of Procedure of 1848 abolished the distinction between actions at law and suits in equity and simply required a plaintiff to include in his complaint '[a] statement of the facts constituting the cause of action.'" *Davis v. Passman*, 424 U.S. 228, 237 (1979). Petitioner and the Government apparently believe that the ATCA lay dormant from the day of its passage in 1789 until sometime in the nineteenth century when it suddenly sprang into meaning with the arrival of the cause-of-action concept. But that position renders incomprehensible such Supreme Court decisions as *The Paquete Habana*, 175 U.S. 677 (1900), and *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), in which this Court approved the application of customary international law in U.S. courts even in the absence of positive Congressional enactment.

In summary, the *en banc* decision below rests on an interpretation of the ATCA traceable to the Second Circuit's decision in *Filartiga*, adopted by every circuit to address and resolve the question, in a sequence of cases denied additional review by this Court. *Certiorari* should not be used to resolve largely academic questions in a case that fails the standards set forth in SUP. CT. R.10.

C. The Coherent Jurisprudence of the Courts Under the ATCA Does Not Compromise the Ability of the Political Branches to Conduct Foreign Affairs.

Petitioner and the Government argue that *certiorari* is appropriate because the ATCA interferes with the essential foreign affairs prerogatives of the political branches. But "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."

Baker v. Carr, 369 U.S. 186, 211 (1962). Petitioner's concerns reflect more hyperbole than analysis: over the years, the political branches – especially the executive branch – have sometimes supported the exercise of jurisdiction under the ATCA and sometimes opposed it. Nor do the Petitioner and the Government acknowledge that the courts have developed a variety of techniques and doctrines to screen out frivolous, vexatious, or politically charged cases.

i. The Executive Branch

As noted above, contemporaneous analyses by the Attorney General established that the ATCA provided a civil remedy for aliens injured by a tortious violation of the law of nations. In our own time, in multiple public pronouncements, the U.S. Department of State has also recognized that the ATCA establishes both subject matter jurisdiction and a cause of action for serious violations of international law. In describing the ATCA in its official submission to the U.N. Committee against Torture, for example, the Government of the United States declared that

> U.S. law provides *statutory rights of action* for civil damages for acts of torture occurring outside the United States. One statutory basis for such suits, the Alien Tort Claims Act . . . represents an early effort to provide a judicial remedy to individuals whose rights have been violated under international law.[9]

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[9] Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at 60 (emphasis supplied).

Petitioner's argument is also contradicted by executive branch submissions in human rights litigation under the ATCA. In *Filartiga*, for example, the government argued that the law of nations as it had evolved obligated every state to respect the right of its own citizens to be free of torture and that this obligation bound the United States as well even in the absence of additional Congressional enactments. According to the government, the modern-day torturer had – like the pirate in the eighteenth century – become *hostis humani generis*, the enemy of all mankind, and therefore liable wherever he might be found.[10] The United States took a similar position fifteen years later in *Kadic v. Karadzic*.[11] That the current Justice Department has taken a different view of some pending ATCA litigation does not imply that the meaning of this 214-year old statute should change from year-to-year and administration-to- administration.

ii. The Congress

Congress has twice legislated in this area over the past decade, and both times it has left the ATCA intact, in the process expanding, not restricting, the categories of international human rights claims cognizable in federal

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[10] *See* Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, (2d Cir. 1980), *reprinted in* 19 INT'L LEG. MATS. 585 (1980), at 601-606.

[11] *See* Statement of Interest of the United States, *Kadic v. Karadzic*, No. 94-9035 (2d Cir. 1995).

court.[12] The TVPA *inter alia* codified the holding in *Filartiga* and extended it to citizens of the United States.[13] Congress was fully aware of the fractured opinions in *Tel-Oren*, *supra*, and, according to its principal sponsor, the TVPA was adopted to "lay it all to rest".[14] In multiple judicial decisions, the courts have found significance in the fact that Congress had a clear opportunity to revise or restrict the ATCA in light of *Tel-Oren* and did precisely the opposite. *See. e.g., Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, 105 (2d Cir.

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[12] *See* TVPA, 28 U.S.C. § 1350 note (extending claims for torture and extrajudicial execution to U.S. citizens as well as aliens); and the "terrorist state" exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (2000) (creating exception to sovereign immunity for lawsuits alleging specified human rights violations against certain States).

[13] According to the House Report, "[t]he TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 . . . ." H.R. Rep. No. 367, 102d Cong., 1st Sess., pt. 1 (1991). Significantly, the House Report referred to the *Filartiga* decision with approval, affirmed the importance of ATCA, and indicated that it "should not be replaced." *Id.* The Senate Report contains almost identical language. S. Rep. No. 249, 102d Cong., 1st Sess. (1991).

[14] Torture Victim Protection Act of 1989, Hearings Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary, 101st Cong. 36, 65 (1990) (statement of Senator Spector).

2000), *cert. denied*, 532 U.S. 941 (2001). *Accord Hilao v. Marcos*, 25 F.3d at 1475; *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996). *Certiorari* jurisdiction should not be extended for the purpose of restricting a statute that Congress has endorsed in its current form and has shown no interest in restricting.

iii. The Courts

For Petitioner and the Government to suggest that the courts are powerless to protect themselves from abusive or politically dangerous cases is disingenuous: the judiciary has developed the political question doctrine and the act of state doctrine, *inter alia*, to ensure respect for separation of powers, and statutory immunities and the *forum non conveniens* doctrine may apply in appropriate cases.[15] It is significant for example that the executive branch has previously argued that there are circumstances in which the *failure* to allow ATCA litigation to go forward could adversely affect U.S. foreign

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[15], *See generally Kadic v. Karadzic*, 70 F.3d 232, 248-249 (2d Cir. 1995) ("We do not read *Filartiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations"). *Accord Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (dismissed for failure to prove international standards); *Abdullahi v. Pfizer, Inc.*, 2002 WL 31082956 (S.D.N.Y., Sept. 17, 2002) (dismissed under *forum non conveniens* doctrine); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D.Cal. 2002) (act of state doctrine barred adjudication of environmental tort and racial discrimination claims).

policy: "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, (2d Cir. 1980), *supra*, at 604. The government fully recognized then in its *Filartiga* brief that some ATCA cases could be highly-charged but not for that reason nonjusticiable:

> Because foreign officials are among the prospective defendants in suits alleging violations of fundamental human rights, such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance.... [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. [citation omitted] When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts.

Id., at 602-604. *Accord* Statement of Interest of the United States, *Kadic v. Karadzic* (2d Cir. 1995), at 3 ("Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them."). In short, the courts have access to effective, but fact-dependent doctrines that distinguish proper from improper cases under the ATCA. Granting *certiorari* in a case where the limits of these doctrines were not tested is unnecessary and unwise.

iv. Proving the content of custom

Petitioner and the Government assert that *certiorari* is appropriate because ATCA courts have turned to unratified and non-self-executing treaties, as well as the submissions of academics, to give content to the law of nations. But the courts in ATCA cases have relied on precisely the evidentiary authorities this Court has identified as appropriate in identifying international customary law. Contrary to the Petitioner's assertion, the ATCA does not and cannot enforce unratified or non-self-executing treaties. Nor does it convert non-binding resolutions of the United Nations into law. But by its terms, the ATCA does require the courts to determine the content of the law of nations, and that process is necessarily more complicated than consulting a treaty's text: customary international law arises out of a generally consistent state practice recognized out of a sense of legal obligation (*opinio juris*). The evidence of both the objective element and the subjective element can take many forms, so long as it reflects states' practice and the sense of obligation. *See, e.g., Restatement (Third) U.S. Foreign Relations Law*, § 102(2). *See also The Paquete Habana, supra*; *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

In *Filartiga*, for example, the Second Circuit concluded that torture was a violation of the law of nations on the basis of multiple, reinforcing forms of evidence, consulted not because they were binding *per se* as a treaty might be, but because they offered evidence that states considered torture illegal. No government disagreed with that conclusion, even though it was based *inter alia* on treaties in consistent form – including some to which the United States was not a party –

a draft convention prohibiting torture, laws and constitutions of states around the world, resolutions of international organizations condemning torture, the defenses offered by non-conforming states, and the writings of publicists. *Filartiga*, 630 F. 2d, at 882-84. Although the law of nations has no public law number, this Court has identified the sources that the courts should consult to give it content: "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators ." *The Paquete Habana*, 175 U.S., at 700. This accepted methodology was applied in this case.

Cases following *Filartiga* show a judiciary thoroughly familiar with this process, successfully distinguishing between norms that are "specific, universal, and obligatory," *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994), and those that are not.[16]

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[16] *Cf.*, *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D.Cal.1986) ("violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations' ").

II. The Courts Are Not Divided on the "Proper Reach" of the ATCA: *Jus Cogens* Violations Are Sufficient but Not Necessary to Satisfy the Jurisdictional Requirements of the ATCA.

Petitioner argues that the Ninth Circuit's standard of liability "squarely conflicts" with the Second Circuit's liability standard, Pet. Br., at 22, alleging that the Second Circuit requires ATCA plaintiffs to establish not just a violation of customary international law but a violation of *jus cogens*, invoking the Latin phrase that refers to an elite subset of peremptory norms that can in principle invalidate a state's treaties.[17] *Certiorari* is inappropriate to consider this issue (and the academic esoterica on which it rests) because there is no conflict between the standards in the two circuits: Petitioner's allegations rest on a mischaracterization of the

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[17] Originally, *jus cogens* was a doctrine of Roman contract law, holding that the freedom of contract was necessarily limited by certain natural law principles of good morals and public justice. Its related meaning in contemporary international law is established by Section 102 of the Restatement (Third) of Foreign Relations Law:

> Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation, and prevailing over and invalidating international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.

American Law Institute, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, §102, cmt. k.

Second Circuit cases, and subsequent Second Circuit decisions not cited by the Petitioner have explicitly affirmed that violations of customary international law – even when they fall short of *jus cogens* violations – are fully actionable under the ATCA in that Circuit. *See Flores v. S. Peru Copper Corp.*, 2003 U.S. App. LEXIS 18098 (August 29, 2003). The consistent position of every court to address and resolve the issue is that any interpretation of ATCA requiring *jus cogens* violations would be contrary to the plain language of the statute and misconceive the relationship between the law of nations a nd *jus cogens*. The circuit courts have therefore repeatedly and uniformly resisted the invitation of defendants, like the Petitioner in the proceedings below, to rewrite the ATCA to require *jus cogens* violations.

A. There Is No Split Among The Circuits On The Necessity *Vel Non* of a *Jus Cogens* Violation under the ATCA.

The Second and the Ninth Circuit courts are not split on the issue of whether ATCA is available only to enforce *jus cogens* norms, and Petitioner's argument to the contrary is based on his exaggerated and implausible parsing of the language in two Second Circuit cases, *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995), and *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2nd Cir. 2000), for the proposition that Second Circuit ATCA jurisprudence recognizes only violations of *jus cogens* norms, at least with regard to individual – not state – defendants. However, as appellants must concede, Pet. 23 n.6, neither *Kadic* nor *Bigio* states that ATCA claims against individuals are limited to *jus cogens* violations. Despite the Second Circuit's use of the term "universal concern," *Bigio*,

239 F.3d at 448, the two cases do not offer an exclusive listing of the actions that fall under this category – much less state that "universal concern" is coterminous with *jus cogens*. At most, these cases demonstrate two endpoints of the ATCA's application – one at which the ATCA definitely applies (*e.g.*, war crimes, torture and genocide), another at which it definitely does not (*e.g.*, purchase by private individuals of property a state had previously unlawfully confiscated). They do not require a *jus cogens* norm for ATCA purposes.

The Second Circuit has recently confirmed that there is no conflict between its approach and that of the Ninth Circuit. In *Flores v. Southern Peru Copper Corporation*, 2003 U.S. App. LEXIS 18098 (August 29, 2003), the Second Circuit affirmed that ATCA claimants were only required to allege a violation of customary international law. *Id.* at *38. *Flores* involved an ATCA claim against a private corporation for environmental degradation. The court made no mention of any requirement to plead or prove *jus cogens* norms under ATCA and engaged in traditional customary law analysis.

The *Flores* standard is entirely congruent with the Ninth Circuit's approach in this case and in prior decisions. In *In re Estate of Ferdinand E. Marcos*, 25 F.3d 1467, 1474 (9th Cir. 1994) ("Estate II"), the Ninth Circuit held that under ATCA "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." *Accord Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998). The Ninth Circuit has ruled that a *jus cogens* violation is sufficient to satisfy the "specific, universal, and obligatory" standard, *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789, 795 (9th Cir. 1996) ("*Hilao II*"), but it has

never endorsed the more restrictive proposition that a *jus cogens* violation is necessary. To the contrary, in *Martinez*, the Ninth Circuit ruled that arbitrary arrest and detention were actionable under the ATCA without demonstrating that the prohibition on such conduct rose to the level of *jus cogens*. Similarly, in *Hilao II*, the Ninth Circuit explicitly noted that torture is "prohibited not only by a specific, universal, and obligatory norm but by one that reaches the level of jus cogens." 103 F.3d at 794. This language would be incomprehensible if the "specific, universal, and obligatory" criteria referred only to *jus cogens*.

The less strained interpretation is that the "specific, universal, and obligatory" standard allows the court to distinguish between genuinely customary international law and merely idiosyncratic or aspirational norms. The first courts to articulate the "specific, universal, and obligatory" test did so precisely to guide these sometimes difficult judgments. *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987). In short, no circuit court has limited the application of the ATCA to *jus cogens* violations, even in cases involving private actors.[18]

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[18] The question of the ATCA's applicability to private actors is ir relevant t o t he resolution o f t his c ase a s it ha s b een conceded since the beginning of this case that the appellant was acting under the color of law. *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990).

B. The Plain Language Of The ATCA Requires That Plaintiff's Meet the Exacting Requirements of Proving A Violation of The Law of Nations, Not the Extraordinary Requirements of Proving a Violation of *Jus Cogens*.

The words actually used by Congress in the ATCA refer only to "the law of nations or a treaty of the United States." There is no additional requirement that the plaintiffs' claims fall within an elite subset of customary law norms designated *jus cogens*.

It is clear under this Court's precedents, that a customary norm need not qualify as *jus cogens* in order to be justiciable generally. *See, e.g., The Paquete Habana*, 175 U.S. 677 (1900), (the government's interference with domestic coastwise fishing vessels in time of war violated an established customary international norm, but there was no demonstration that such actions also satisfied the extraordinary test of jus cogens.). None of the cases require more under ATCA. *See, e.g., Filartiga v. Pena-Irala*, 630 F. 2d 800 (2d Cir. 1980) (holding that torture is a clear violation of customary international law without also demonstrating that the prohibition of torture amounted to *jus cogens*).

In summary, the actual language of the statute – "the law of nations or a treaty of the United States" – adopts a high but not the highest (and most controversial) jurisdictional threshold. There is no textual or historical basis for requiring the violation of a *jus cogens* norm under ATCA, and there is no split among the courts on this point.

III. There Is No Split among the Lower Courts on the Proposition That Arbitrary Arrest and Detention Are Violations of "The Law of Nations Or a Treaty of the United States."

The Ninth Circuit *en banc* ruled correctly that arbitrary arrest and detention are valid claims under the ATCA. There is no authority for the truth or the relevance of Petitioner's view that the freedom from arbitrary arrest and detention, traceable to the Magna Carta,[19] "undermines the federal government's anti-crime and anti-terrorism efforts." Pet. Br., at 27. To make this claim in the context of a case involving a defendant acquitted of all charges is an outrage.[20] The right to be free from arbitrary arrest and detention is fundamental to a democratic and free society. Petitioner

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[19] "No free man shall be taken or imprisoned…except by the lawful judgment of his peers or by the law of the land."

[20] Especially outrageous is Petitioner's invocation of 21 U.S.C. § 878(a)(3), dealing with the enforcement powers of DEA agents. Pet. Br., at 28. First, Petitioner is not and was not a DEA agent. International bounty hunters do not stand in the shoes of U.S. enforcement agents. Second, the fact that the United States has *jurisdiction to prescribe* (*i.e.* that its substantive criminal laws may apply extraterritorially) distinctly does not mean that it has *jurisdiction to enforce* (*i.e.*, that any U.S. agent may violate another state's territorial sovereignty). Enforcement powers, like arrest and detention, are inherently territorial, unless Congress explicitly rules otherwise. Section 878 is utterly silent on its applicability abroad.

would evidently like this Court to retry the issue of whether Respondent's brutal and lawless treatment amounted to a violation of international law – an issue it lost at the trial level and twice at the appellate level, once before the panel and once before the court *en banc*.

The right to be free of governmental abuse, especially in the process of arrest and detention, has been reaffirmed in international declarations such as the Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) (Article 9), numerous regional agreements such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, entered into force, Sept. 3, 1953, 213 U.N.T.S.222, E.T.S. No. 5 (Article 5), and in binding international covenants such as the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force March 23, 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (Article 9). It is also enshrined in national constitutions and laws, most notably the Fourth Amendment to the U.S. Constitution.

Applying these uncontroversial standards, the courts have repeatedly and uniformly affirmed the principle that arbitrary arrest or detention violates international law. *See, e.g., Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1395, 1397 (5th Cir. 1985); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184–85 (D. Mass. 1995); and *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Forti v. Suarez Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987). There is no split among the circuit courts on this issue, and *certiorari* is

inappropriate to engineer a retrial on the underlying issue of the Petitioner's liability.

CONCLUSION

This Court's *certiorari* jurisdiction should not be used to resolve academic debates, as is inevitable when there is no disagreement among the lower courts on the questions presented. The petition for a writ of *certiorari* should be denied.

October 6, 2003

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IN THE

Supreme Court of the United States

JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioner demonstrated in his opening brief that this case raises fundamentally important questions that directly affect the national security, foreign policy, and economic interests of the United States. The *amicus* filings by law enforcement officers, broad-based business groups, human rights activists, and the United States amply confirm that showing. Respondent's various attempts to dismiss the significance of the extraordinary decision below—and to justify the expansive interpretation of the Alien Tort Act ("ATA") that produced that decision—are wholly unpersuasive.

1.a. In its *amicus* filing, the United States confirms that judicial implication of a cause of action under the ATA undermines the ability of the political branches to protect the Nation's security and to control the conduct of its foreign relations. Contrary to respondent's claim, there is nothing "pretextual" about these harms. Opp. 3.

This very case illustrates the harms that the decision below will inflict on federal efforts to protect national security and combat international crime. Petitioner was held liable in damages for assisting in a plan, approved by senior government officials, to apprehend an alien indicted for murdering a Drug Enforcement Agency ("DEA") agent in Mexico. Enlisting the assistance of foreign individuals in sensitive law enforcement operations abroad is an inherently difficult task. Exposing those who provide such assistance to damages and the burdens of litigating in U.S. courts can only discourage others from assisting in the future, to the obvious detriment of federal law enforcement efforts abroad. See Brief for the United States in Support of the Petition ("U.S. Br.") at 7-8, 26. Although respondent claims that the facts of this case are "unique," he cannot explain why those who assist U.S. officials in future overseas law enforcement efforts—or in the capture of terrorists on foreign soil—would not be subject to suit and potential liability under the Ninth

Circuit's interpretation of the ATA.[1] See Pet. App. 72a n.1 (O'Scannlain, J., dissenting) ("no rational observer can honestly say that our court's holding today 'is a limited one.'").

Instead, respondent argues that this Court should tolerate such interference until an alien challenges the validity of an extraterritorial arrest authorized by the President himself, a Cabinet officer, or Congress. Opp. 3. Of course, as petitioner and the United States have shown, Congress has already authorized the DEA and the Federal Bureau of Investigation ("FBI") to make such arrests. See Pet. 27-28; Petition for a Writ of Certiorari of the United States at 17-20, *United States* v. *Alvarez-Machain*, No. 03-485 (U.S. filed Oct. 1, 2003) ("U.S. Pet."). More fundamentally, respondent's suggestion highlights the need for review. It is inconceivable that the first Congress intended to grant aliens the right to challenge the authority of the President or Congress to protect the Nation's security through extraterritorial arrests. Yet, as respondent implicitly concedes, the Ninth Circuit's construction of the ATA permits such extraordinary lawsuits.

Respondent's suggestion that various judicial doctrines afford ample protection against suits that interfere with the Executive Branch's discharge of its national security responsibilities, Opp. 3, 19-20, is baseless. Respondent cites no case in which a court has ever dismissed an ATA claim under the political question doctrine, and even the dissenters below conceded that it did not bar respondent's claim here. Pet. App. 73a n.2 (O'Scannlain, dissenting). The act of state doctrine only prohibits U.S. courts from judging "the acts of the government *of another*," *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897) (emphasis added), not the acts of the

[1] The fact that respondent was acquitted of the criminal charges against him is no distinction at all. Under the Ninth Circuit's reasoning, petitioner would have been liable for an arbitrary arrest and detention in violation of international law regardless of respondent's guilt or innocence.

U.S. government.[2] And *forum non conveniens* principles do not preclude judicial review at all, but rather shift review to the courts of another country, see, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 n.22 (1981) (doctrine permits dismissal only where suit can proceed in an adequate alternative forum), which would profoundly exacerbate, not prevent, interference with the Executive Branch's discharge of its constitutional responsibilities. In short, because implication of an ATA cause of action interferes with the Executive Branch's ability to enforce criminal laws and to protect national security, this Court should grant the petition.

Moreover, as petitioner has shown, the mere fact of ATA litigation can cause international tensions that complicate, and sometimes compromise, the Executive Branch's ability to conduct and control the Nation's foreign affairs. See Pet. 18-19. The Executive Branch's judgments that certain prior cases did not give rise to these harms, see Opp. 20, does not change the fact that implication of an ATA cause of action *can* interfere with the conduct of foreign relations, as even the majority below admitted. See Pet. App. 18a ("human rights litigation under the [ATA] inevitably raises issues implicating foreign relations"). The potential for such interference—and the near certainty that Congress did not intend to authorize suits by aliens with such potential—further justifies review by this Court.

Finally, respondent does not rebut petitioner's showing that implication of an ATA cause of action has led the lower courts to usurp political responsibility for determining which norms of international law should be deemed binding. Pet. 14. Respondent claims that the ATA "does not and cannot enforce unratified and non-self-executing treaties." Opp. 21. But where, as in this case, a lower court relies on such treaties and on non-binding U.N. resolutions to discern a "specific,

[2] Moreover, the courts have concluded that "it would be a rare case in which the act of state doctrine precluded suit under [the ATA]." *Kadic* v. *Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995).

universal, and obligatory" international norm, see Pet. 14 (internal quotation marks omitted), the court inescapably does give binding force to international instruments that the political branches have chosen not to treat as binding.

As this very case shows, moreover, enforcement of such norms also gives extraterritorial effect to U.S. law—namely, to the U.S. legal system's decision to provide *remedies* for violations of international norms that themselves include no remedies. Cf. Brief of *Amici Curiae* Lawyers Committee for Human Rights and The Rutherford Institute at 10. The decision to provide remedies for violation of such norms, however, is one that Congress, not the courts, should make. The fact that implication of an ATA cause of action leads to such "anti-democratic" violations of separation-of-powers principles, *Al Odah* v. *United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (Randolph, J., concurring), *cert. granted*, 72 U.S.L.W. 3171 (U.S. Nov. 10, 2003) (Nos. 03-334, 03-343), and to extraterritorial applications of U.S. law that the first Congress never intended, see Pet. 15, provide further justification for review of the decision below.

b. Contrary to respondent's claim, the lower courts and Congress have not uniformly embraced an interpretation of the ATA that produces such untoward results. Although there is no definitive division of authority among the circuits over implication of an ATA cause of action, the Second Circuit itself recently noted that the views expressed by Judges Bork and Robb in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), and by Judge Randolph in *Al Odah*, "suggest[] that the law of the District of Columbia Circuit stands in contrast to that of our Circuit." *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 151 (2d Cir. 2003); see also *id.* at 153 (noting "differing perspectives among judges and scholars" over the "meaning and scope of" the ATA). In light of the fundamental importance of the issues raised by the decision below, there is no reason to await a more concrete split, which is unlikely to arise given

the ability of aliens to bring future claims in circuits of their choosing. See U.S. Br. 16. Indeed, in *Flores*, the Second Circuit joined Judges Edwards and Bork in calling on this Court to clarify the scope and meaning of the ATA. See 343 F.3d at 153 (judicial differences over the ATA's scope "can be resolved only by Congress or the Supreme Court"). *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring) (scope of the ATA "cries out for clarification by the Supreme Court"); *id.* at 823 (Bork, J., concurring) (expressing the hope "that clarification will not be long delayed").

Nor is it true that the Torture Victim Protection Act ("TVPA") "codified" *Filartiga*. Opp. 18. If anything, the TVPA contradicts the Second Circuit's holding. Congress did not need to grant aliens an express cause of action for a very narrow category of international law violations if the ATA already provided a right to sue for violations of *all* universally recognized human rights norms. And statements in the legislative history of the TVPA, which was enacted in 1991, have no bearing on the meaning of a law enacted by a different Congress more than 200 years earlier. Indeed, in contrast to respondent's claims of congressional ratification, the Second Circuit has candidly acknowledged that Congress has *not* "definitively resolved the complex and controversial questions regarding the meaning and scope of the [ATA]." *Flores*, 343 F.3d at 153.

c. Finally, respondent's mistaken claim that implication of an ATA cause of action is correct as a matter of law, Opp. 12-15, provides no basis for denying review of this important issue. As petitioner has shown, Pet. 12-13, the ATA is phrased in strictly jurisdictional terms, and contains none of the "'rights-creating' language so critical" to implication of a cause of action. *Alexander* v. *Sandoval*, 532 U.S. 275, 288 (2001). Respondent makes much of the fact that the ATA does not use the "arising under" language of 28 U.S.C. § 1331, Opp. 12, and that the Act instead refers to "any civil action . . . for a tort . . . committed in violation of the law of

nations or a treaty of the United States." 28 U.S.C. § 1350. But if the latter language is sufficient to confer a cause of action for torts in violation of the law of nations, then it also confers a cause of action on aliens alone for any tort in violation of a treaty of the United States—whether or not the treaty is self-executing, see *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring). Respondent recognizes that such a result is utterly implausible and attempts to disavow it. Opp. 21 (ATA "cannot enforce . . . non-self-executing treaties").[3] But he nowhere explains why, if an implementing statute is necessary to sue for a treaty-based tort under the ATA, no such legislation is needed to sue for a tort based on the "law of nations."

In fact, the founding generation thought such express authorization was necessary. Respondent contends that the notion of a "cause of action" did not even exist when the ATA was adopted, *id.* at 14. But, as this Court has explained, the phrase "cause of action" can refer *either* to "the alleged invasion of 'recognized legal rights' upon which a litigant bases his claim for relief," *Davis* v. *Passman*, 442 U.S. 228, 237 (1979)—a concept first introduced in 1848, *id.*—*or* to the distinct concept of whether a plaintiff "may . . . appropriately invoke the power of the court." *Id.* at 240 n.18. The first Congress was plainly familiar with the latter concept. In fact, in 1781, the Continental Congress passed a resolution urging states to enact criminal penalties for violations of the law of nations and "'to authorise suits to be instituted for damages by the party injured.'" William S. Dodge, *The Historical*

[3] That disavowal fatally undermines respondent's reliance on Attorney General Bradford's 1795 opinion, *see* Opp. 14 n.8, because the "violation" Bradford thought redressable under the ATA was a "violation of a treaty" of neutrality. *See* 1 Op. Att'y Gen. 57 (1795). Respondent's reliance on *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.C.S.C. 1795) (No. 1607), is equally misplaced. *See* Opp. 13. The reference to the ATA in that case was dicta, inasmuch as the court had admiralty jurisdiction and the "libellant" sought restitution, 3 F. Cas. at 810-11, which is not a remedy for damages in tort. *See* W. Prosser & W. Keeton, *The Law of Torts* § 94, at 672-73 (5th ed. 1984).

Origins of the Alien Tort Statute: A Response to the "Originalists," 19 Hastings Int'l & Comp. L. Rev. 221, 227 (1996). Moreover, the author of the ATA, Oliver Ellsworth, was a member of both the Continental Congress that passed the resolution and the 1782 Connecticut General Assembly that responded by adopted a statute that authorized suits by foreign powers or subjects to remedy torts. *Id.* at 228-29, 231.[4] Thus, although the first Congress would not have used the phrase "cause of action" to refer to the concept of statutory authorization to invoke the power of the courts, the 1781 Resolution demonstrates that the first Congress understood the need for authorization to sue for a tort in violation of the law of nations, yet did not include such a right in the ATA.

In sum, there is compelling evidence that implying a cause of action under the ATA is wrong as a matter of statutory and constitutional law. The issue is profoundly important and will not benefit from further consideration by the lower courts. This Court should grant the petition to provide the clarification that Judges Edwards and Bork some time ago requested, *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring); *id.* at 823 (Bork, J., concurring), and that the Second Circuit just recently confirmed is still needed. *Flores*, 343 F.3d at 153.

2. Review is also needed to determine the proper scope of the cause of action that the Second, Ninth and Eleventh Circuits have erroneously implied under the ATA. Despite respondent's claims of coherence and uniformity, the lower courts continue to employ a bewildering array of verbal formulations to describe the liability standards they have been forced to create. They also employ starkly conflicting methods in their efforts to give content to that standard.

As petitioner has explained, the Second Circuit has upheld ATA liability against private parties only for violations of *jus*

[4] Such an authorization, of course, would have been wholly unnecessary if, as respondent claims, the law of nations was a self-implementing part of the common law.

cogens norms—a limitation the Ninth Circuit has expressly rejected. Pet. 23-25. To be sure, the Second Circuit has never used this precise phrase in describing the standard of liability under the ATA. But in *Flores* as in earlier cases, the Second Circuit identified *jus cogens* violations, such as "official torture, extrajudicial killings, and genocide," as violations of customary international law that are actionable under the ATA. 343 F.3d at 156; see also *Kadic* v. *Karadžić*, 70 F.3d 232, 240 (2d Cir. 1995); *Bigio* v. *Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2001). The Second Circuit has not embraced the lesser liability standard that allowed the Ninth Circuit to deem respondent's relatively brief detention a violation of customary international law.[5]

Indeed, in *Flores*, the Second Circuit largely rejected the Ninth Circuit's approach to determining which norms of international law are enforceable under the ATA. In stark contrast to the decision below, the Second Circuit held that resolutions of the U.N. General Assembly "are not proper sources of customary international law because they are merely aspirational and were never intended to be binding on member States of the United Nations." 343 F.3d at 165. In addition, the Second Circuit recognized that non-self-executing treaties that have not been implemented are dubious sources of binding international norms, and it declined to derive such a norm from the non-self-executing International Covenant on Civil and Political Rights, *id.* at 164, one of the documents the Ninth Circuit relied on below. Pet. App. 26a.

More fundamentally, the Second Circuit has effectively conceded that the task of identifying binding norms of

[5] The *Flores* decision, however, does add to the muddle of existing ATA liability standards by rejecting use of a "shockingly egregious conduct" standard, 343 F.3d at 158-60—a standard the Fifth Circuit expressly adopted based on an earlier Second Circuit decision. *See Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (citing *Zapata* v. *Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam)).

international law is hopelessly unmanageable. Such norms, the Second Circuit acknowledged, must be:

> discerned from myriad decisions made in numerous and varied international and domestic arenas. Furthermore, the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law . . . is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source. All of these characteristics give the body of customary international law a soft, indeterminate character, that is subject to creative interpretation.

Flores, 343 F.3d at 154 (citation, footnote and internal quotation marks omitted). These difficulties demonstrate the impropriety of implying any cause of action at all under the ATA. At a minimum, the indeterminate nature of the task and the conflicting approaches of the lower courts confirm the critical need for clarification by this Court.

3. Finally, this Court should grant the petition to review the Ninth Circuit's ruling that respondent's brief arrest and detention violated customary international law. Because that ruling turned on the Ninth Circuit's conclusion that the DEA lacks statutory extraterritorial arrest authority, petitioner is plainly entitled to seek review of the lower court's interpretation of 21 U.S.C. § 878(a)(3), notwithstanding that he "is not and was not a DEA agent." Opp. 28 n.20. And, as the United States has made clear, U.S. Br. 28; U.S. Pet. 14-26, the scope of the DEA's arrest authority—and the FBI's identical authority—*is* crucial to the federal government's anti-crime and anti-terrorism efforts. Cf. Opp. 28. Indeed, the government has shown that "[t]hreats to the Nation's security and citizenry are now, more than ever, transnational phenomena," and that the lower court's holding "threatens the government's ability to conduct necessary law enforcement

operations abroad to combat terrorism, international crime, and the flow of illegal drugs into the United States." U.S. Pet. 15-16. This Court should not countenance such significant harms simply because there is no split of authority in the lower courts on this issue.

For these same reasons, this Court should also consider the related issue of whether respondent's detention was of sufficient duration to violate international law. In defending this aspect of the decision below, respondent relies upon the same non-binding U.N. resolution and the same non-self-executing treaty that the Ninth Circuit improperly relied upon below. See Opp. 29. The lower court's finding of an arbitrary arrest and detention thus involves many of the same violations of separation-of-powers principles that justify review of that court's implication of an ATA cause of action. See Pet. 29.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 03-339

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,
Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL FOREIGN TRADE COUNCIL, USA*ENGAGE, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION

The National Foreign Trade Council, USA*Engage, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and the United States Council for International Business respectfully submit this brief *amici curiae* in support of the petitioner in this case.[1] The petition raises important questions of first impression for this Court about the meaning and scope of the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") – a statute that lay virtually dormant for two centuries, but that in the past two decades has served as basis for a flood of litigation in U.S. courts. Though initially such suits aimed to hold government officials liable for alleged violations of the law of nations, increasingly U.S. and multinational companies investing in developing nations are being made the target of ATS litigation. Often, such suits seek to hold private companies indirectly liable for human rights abuses by foreign governments, on the theory that by deciding to invest abroad, the companies aided and abetted or otherwise facilitated the acts of the host governments.

Lower courts struggling to interpret the ATS have come to dramatically different conclusions about its meaning. Although the plain language of the statute makes clear that it is simply a grant of jurisdiction, some courts have implied in it a private cause of action. Those courts that have implied a private cause of action have struggled to develop limiting principles, including defining what constitutes an actionable

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity, other than *amici curiae*, their members or their counsel, made a monetary contribution to the preparation or submission of this brief. All parties before the Court have consented in writing to the filing of this brief. A copy of that consent has been submitted to the Court.

violation of the law of nations. The lower courts have taken starkly different approaches to these questions, resulting in great uncertainty for U.S. companies currently investing or operating in foreign countries, or considering future investments.

The decision below exemplifies two wrong turns made by some courts interpreting the ATS, and provides an ideal opportunity for this Court to bring clarity to an area of the law that for two decades has cried out for it. First, the Ninth Circuit erroneously read into the statute's jurisdictional grant a private cause of action. Second, in defining what constitutes an actionable violation of the law of nations under its implied cause of action, the Ninth Circuit relied on non-binding international declarations, unratified or non-self-executing treaties, and unreliable commentary. Days before the petition was filed in this case, the Second Circuit forcefully rejected reliance on such instruments as sources as for defining customary international law. *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 160-171 (2d Cir. 2003). The decision of the Ninth Circuit below raises serious separation of powers issues, and highlights the foreign policy concerns that underlie the vast majority of ATS cases. Clarifying the proper meaning and scope of the ATS not only will assist the United States in its overseas law enforcement efforts and war on terrorism – as set forth in the U.S. government's submission – it is of profound importance to *amici* and their member companies in today's global economy.

INTEREST OF AMICI CURIAE

Amici curiae and their members have a vital interest in the issues raised by petitioner. Over the past decade, scores of U.S. and multinational companies have been sued under the ATS relating to their operations outside the United States. While some companies are alleged to have committed violations of the law of nations directly, more often

plaintiffs have alleged that companies' overseas investments have aided and abetted or otherwise facilitated human rights abuses by foreign governments. Not only do these lawsuits strain relations between the United States and the foreign governments who are the indirect targets of the litigation, they discourage foreign investment by U.S. companies. Because of the importance of these issues to *amici's* member companies, they seek leave to file this brief *amici curiae* in order to assist the Court in its consideration of the issues in this case.

The National Foreign Trade Council (the "NFTC") is the premier business organization advocating a rules-based world economy. The NFTC and its affiliates serve more than 300 member companies.

USA*Engage is a broad-based coalition representing organizations, companies and individuals from all regions, sectors and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state and local level.

The National Association of Manufacturers (the "NAM") is the nation's largest broad-based industrial trade association. The NAM represents 14,000 member companies (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. Chamber members transact business in all of the United States, as well as in large numbers of countries around the world.

The United States Council for International Business ("USCIB") is a trade association of approximately 300 global corporations, accounting firms, law firms, and business associations.

In the aggregate, the organizations filing this brief represent a substantial proportion of all entities doing business in the United States and, indirectly, much of the U.S. workforce. These same entities are also major players in the global economy. The *amici* are charged with representing the legal and policy interests of their members in matters of national import. They are regularly involved in litigation relating to international commerce and foreign policy issues. Such cases have included, for example, *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000), in which the NFTC brought suit with *amicus* support from the Chamber, the NAM, and USCIB, and *American Ins. Ass'n v. Garamendi,* 123 S. Ct. 2374 (2003), in which several of the groups filed *amicus* briefs.

ARGUMENT

Over the past decade, the ATS has become a serious impediment to U.S. companies investing abroad. Foreign plaintiffs and the lawyers and organizations supporting them – often pursuing thinly disguised political agendas – have adopted the statute as a vehicle to embarrass foreign governments and to pressure U.S. companies to abandon foreign investments. In some cases, the ATS has been used to challenge private foreign investment that the political branches of the United States have explicitly condoned or encouraged.

These lawsuits normally raise highly charged allegations of human rights abuses or other violations of international law, generate considerable publicity, and involve enormous potential damages. The very existence of such lawsuits creates risk and poses a growing and significant obstacle to foreign investment by U.S. and multinational companies. Compounding the risk of suit is the uncertainty resulting from erroneous and conflicting decisions by lower courts interpreting the ATS. Not only is there fundamental disagreement about whether the ATS provides a private cause of action, courts have adopted radically different standards for determining what acts constitute violations of the law of nations, and who may be held accountable under the statute.

Twenty years ago, the D.C. Circuit noted that this area of the law "cries out for clarification by the Supreme Court." *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, (D.C. Cir. 1984) (Edwards, J., concurring), *cert denied*, 470 U.S. 1003 (1985). Just weeks ago, the Second Circuit echoed this sentiment, noting that "the complex and controversial questions regarding the meaning and scope" of the ATS can only be resolved by this Court, or by Congress. *Flores,* 343 F.3d at 153. Now is the time for this Court to take up these urgent questions.

A. The Questions Presented Are Of Exceptional Importance To The U.S. Business Community

The conflicting approaches taken by courts on the meaning and scope of the ATS have created tremendous risk and uncertainty for U.S. businesses investing and operating overseas. Over the past decade, foreign plaintiffs and their lawyers have invoked the ATS to sue scores of U.S. and multinational companies, attempting to hold them liable for their decisions to invest in developing nations around the globe, including, *inter alia*, Colombia, Ecuador, Egypt, Indonesia, Myanmar (Burma), Nigeria, Peru, Papua New Guinea, South Africa, and Sudan.[2] Often these suits seek to hold U.S.

[2] *See, e.g., Flores,* 343 F.3d at 143 (alleging that pollution from mining company in Peru violated right to health and life); *Doe v. Unocal,* 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part and rev'd in part,*

companies liable for alleged violations of the law of nations by foreign governments, under various theories of secondary liability, including aiding and abetting, joint venture, conspiracy, and vicarious liability.

The ATS has also been invoked by plaintiffs and their counsel in an attempt to redress historical grievances. U.S. and foreign companies have been sued under the ATS by plaintiffs seeking reparations dating back to World War II, *see, e.g., Deutsch v. Turner,* 324 F.3d 692, 716 (9th Cir. 2003); reparations for the abuses of the apartheid regime in South Africa, *see, e.g., Digwamaje v. Bank of America, et al.,* No. 02 CV 6318 (JES) (S.D.N.Y. filed Aug. 2, 2002); and even reparations for pre-Civil War slavery in the United States. *See, e.g., In re African American Slave Descendants'*

2002 WL 31063976 (9th Cir. Sept. 18, 2002), *vacated and reh'g granted en banc,* 2003 WL 359787 (9th Cir. Feb. 14, 2003) (alleging that minority investor in gas pipeline aided and abetted forced labor and other abuses by Myanmar military); *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (alleging that private company collaborated in torture, enslavement, war crimes, and genocide by government of Sudan); *Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3d 88 (2d Cir. 2000), *cert. denied,* 532 U.S. 941 (2001) (alleging that private companies are liable for human rights violations of Nigerian government); *Aguinda v. Texaco, Inc.,* 303 F.3d 470 (2d Cir. 2002) (alleging that pollution caused by defendants in Peru and Ecuador violated the law of nations); *Bigio v. Coca-Cola Co,,* 239 F.3d 440 (2d Cir. 2001) (alleging that Coca-Cola violated law of nations by knowingly purchasing property illegally seized by Egyptian government); *Sarei v. Rio Tinto, plc,* 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (alleging that private mining enterprise cooperated with government of Papua New Guinea to displace villages, cause environmental damage and commit other abuses and war crimes); *Doe v. Exxon Mobil Corp.,* No. 01-Civ-1357 (D.D.C. filed June 20, 2001) (alleging that Exxon is liable for human rights abuses committed by Indonesian military); *Digwamaje v. Bank of America, et al.,* No. 02 CV 6318 (JES) (S.D.N.Y. filed Aug. 2, 2002) (alleging that private companies that invested in South Africa are liable for abuses of former apartheid regime).

Litigation, MDL No. 1491 (CRN) (N.D. Ill., First Amended Complaint filed June 17, 2003) (suing banks, insurance companies, railroads, tobacco companies and textile companies under the ATS for alleged connections to slavery or the slave economy).

1. The increasing numbers of ATS actions brought against U.S. companies with regard to their overseas investments pose significant risks. The threat of ATS lawsuits can result in higher insurance costs, difficulties accessing capital markets, and negative effects on shareholder confidence and stock prices. ATS claims can be riskier for companies than other litigation. It is often difficult or impossible to join other parties, including the foreign sovereigns whose acts are ultimately being challenged. Evidence necessary for the defense of ATS claims is often located abroad and may be inaccessible. *See, e.g., Aguinda v. Texaco, Inc.,* 303 F.3d 470, 479 (2d Cir. 2002) (noting inaccessibility of evidence implicating foreign government's role in alleged violations). In addition, U.S. companies are placed at a competitive disadvantage in the global marketplace. Non-U.S. companies that are not subject to the personal jurisdiction of U.S. courts do not need to factor into their investment decisions the risk of ATS litigation.

In addition to the investment risks created by the mere existence of ATS litigation, companies face enormous uncertainty regarding the scope of claims under the ATS. For example, in the decision below, the Ninth Circuit determined what could constitute an actionable violation of the law of nations by relying on international instruments that are non-binding, non-self-executing or that the United States has never ratified.[3] In *Flores,* the Second Circuit expressly re-

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[3] The Ninth Circuit relied on the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess, U.N. Doc. A/810 (1948) ("Universal Declaration"); the International Covenant on Civil and Po-

jected these instruments as sources of customary international law. 343 F.3d at 161-72. To have federal courts attempt to discover the content of the law of nations is inconsistent with the Constitution's delegation to Congress the power "to determine, through legislation, what international law is and what violations of it ought to be cognizable in U.S. courts." *Al-Odah v. United States,* 321 F.3d 1134, 1148 (D.C. Cir. 2003) (Randolph, J., concurring). The uncertainty resulting from courts' efforts to determine the content of the law of nations enormously complicates the factors that all U.S. companies must consider in deciding to invest in foreign nations.

2. As noted in the briefs filed by petitioner and the United States in this case, the willingness of some courts to read a private cause of action into the ATS and to define expansively actionable violations of the law of nations raises significant foreign policy concerns. This is true for cases involving parties as well as governments. As this court recognized last term, "claims between even nominally private entities have become issues in international diplomacy." *American Ins. Ass'n. v. Garamendi,* 123 S. Ct. 2374, 2387 (2003).

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litical Rights, G.A. Res. 2200A, 21st Sess., U.N. Doc. A/6316 (1966) ("ICCPR"); the American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 ("American Convention"); and the Restatement (Third) of the Foreign Relations Law of the United States (1987). *Alvarez-Machain v. United States,* 331 F.3d 604, 620-22 (9th Cir. 2003). The Universal Declaration is non-binding and expresses "principles that are boundless and indeterminate." *Flores,* 343 F.3d at 161. The ICCPR, is non-self-executing. *Id.* at 163 n.35. The Restatement is unreliable evidence of customary international law. *See United States v. Yousef,* 327 F.3d 56, 99 n.31 (2d Cir. 2003). The Senate has never ratified the American Convention.

For example, in an action currently pending against Exxon relating to human rights abuses by the Indonesian military, the U.S. Department of State cautioned the district court that Indonesia's negative reaction to the litigation "could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform." Letter from William H. Taft, IV, Legal Advisor, U.S. Dep't of State, to Judge Louis F. Oberdorfer of July 29, 2002, at 3, *Doe v. Exxon Mobil Corp.,* No. 01-Civ-1357 (D.D.C. filed June 20, 2001). Similarly, the government of South Africa has objected to lawsuits in U.S. courts seeking to hold companies liable under the ATS for investing in South Africa during the Apartheid regime. *See* Declaration of Justice Minister Pennuel Mpapa Maduna, July 11, 2003, at 8, *In re South African Apartheid Litig.,* MDL No. 1499 (S.D.N.Y.) (noting that such lawsuits are an affront to South Africa's sovereignty and interfere with its own reconciliation efforts).[4]

Ironically, although many ATS lawsuits are brought under the guise of concern for human rights, the "free-wheeling" interpretation of law of nations adopted by the Ninth Circuit and other courts in ATS cases, *Al-Odah,* 321 F.3d at 1148 (Randolph, J., concurring), actually deters investment by the very companies that are most likely to adhere to high standards and responsible conduct in their operations. U.S. companies are among the most exemplary

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[4] The British government has also expressed to the United States its "concerns over the extra-territorial use of the Alien Tort Statute" in the apartheid reparations cases. *See* Ministerial Statement of Minister for Trade and Investment Mike O'Brien, July 15, 2003, *available at* http://www.publications.parliament.uk/pa/cm200203/cmhansrd/cm030715/wmstext/30715m05.htm#30715m05.html_sbhd3 .

global corporate citizens, but they can be driven out of the countries that could most benefit from their example and the economic advantages their presence brings. That missed opportunity for all may result in prolonging, not ameliorating, the oppressive conditions that activists and ATS plaintiffs rightly oppose.

B. Review Is Necessary To Resolve Whether The ATS Creates A Private Right of Action, An Issue On Which Courts Are Divided

The ATS was originally enacted in 1789 as part of the first Judicial Code. The Judicial Code set forth the various categories of suits over which the federal courts would have exclusive and concurrent jurisdiction. *See* An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 76-77 (1789).[5] As part of the Judicial Code, the ATS operates solely to vest federal courts with jurisdiction over

[5] Section 9 of chapter 20, in which the original version of the Alien Tort Statute is found, provides that the federal district courts "shall have . . . cognizance of" certain classes of cases. Specifically, that section provides exclusive federal "cognizance" of: "all crimes and offences that shall be cognizable under the authority of the United States . . . where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted"; "all civil causes of admiralty and maritime jurisdiction"; "all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States"; and "all suits against consuls or vice-consuls, except for offences above the description aforesaid." It also provides "cognizance, concurrent with the courts of the several States " of "all causes where an alien sues for a tort only in violation of the laws of nations or a treaty of the United States" and of "all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars." *Id.* As used in the 1789 Act, the term "cognizance" clearly meant "jurisdiction," as has been clarified by subsequent amendments substituting that term. *See, e.g.*, 28 U.S.C. § 1350 (2000).

certain types of claims; it does not also create a private cause of action. *See Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951) (Judicial Code provisions jurisdictional only); *Al-Odah*, 321 F.3d at 1146-47 (Randolph, J., concurring) (ATS jurisdictional only); *Tel-Oren*, 726 F.2d at 799 (Bork, J., concurring) (same); *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (S.D. Tex. 1989) ("Section 1350 merely serves as an entrance into the federal courts and in no way provides a cause of action to any plaintiff.").

1. This construction of the ATS is the only one consistent with the statute's plain meaning. The ATS, now codified at 28 U.S.C. § 1350 (2000), provides that

> [t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

On its face, the language expressly does one thing and one thing only: it vests courts with jurisdiction over a certain class of cases – torts committed in violation of the law of nations or a treaty of the United States. It does not explicitly go further to create a cause of action. Nor can one properly infer an implied cause of action. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (express clues in statutory text necessary to the conclusion that Congress has implicitly created a private cause of action).

In accordance with this plain meaning, similarly worded statutes have been held to be jurisdictional only, not also to give rise to private rights of action. *See, e.g.*, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979) (jurisdictional provision of Securities Exchange Act of 1934); *United States v. Testan*, 424 U.S. 392, 398 (1976) (Tucker Act); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 452 (1852)

(admiralty jurisdiction statute). For example, section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (2000), provides that "[t]he district courts . . . shall have exclusive jurisdiction of violations of" the securities laws of the United States. Tasked with interpreting the scope of that language – nearly identical to the language used in the ATS – this Court was quite clear in holding that it merely "grants jurisdiction to the federal courts," but "creates no cause of action of its own force and effect." *Touche Ross*, 442 U.S. at 577. Thus, just as here, "[t]he source of plaintiffs' rights must be found, *if at all*," in a substantive provision of law, not in the jurisdictional statute itself. *Id.* (emphasis added).

The logical consequence of interpreting the ATS to create private rights also demonstrates the defects inherent in such an interpretation, as the Ninth Circuit itself recognized in *In re Estate of Marcos, Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992 ("*Marcos I*"). On its face, the ATS allows an alien to sue for violations of the "law of nations" as well as "treaties of the United States." 28 U.S.C. § 1350 (2000). Thus, if the language of the ATS supplies an independent right of action for "violation[s] of the law of nations," it must also supply an independent right of action for "violation[s] of . . . a treaty of the United States."[6] But this cannot be. Such a reading would make all U.S. treaties self-

[6] Judge Bork has correctly and succinctly noted this necessary consequence:

> [S]ection 1350 provides jurisdiction for tort actions alleging violations of the 'law of nations' and 'treaties of the United States.' No process of construction can pry apart those sources of substantive law; in section 1350, they stand in parity. If . . . section 1350 not only confers jurisdiction but creates a private right of action for any violation of the 'law of nations,' then it also creates a private cause of action for any violation of the 'treaties of the United States.'

Tel-Oren, 726 F.2d at 820 (Bork, J., concurring).

executing, an "anomalous result" that is incompatible with settled law. *Marcos I*, 978 F.2d at 503; *see also Tel-Oren*, 726 F.2d at 820 (Bork, J., concurring) (the conclusion that the ATS supplies an independent right of action for treaty violations "stands in flat opposition to almost two hundred years of our jurisprudence, and it is simply too late to discover such a revolutionary effect in this little-noticed statute").

Furthermore, no other provision of the first Judicial Code has been construed to create a private right of action. As this Court noted in *Montana-Dakota*, "[t]he Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions." 341 U.S. at 249.

2. Reading a private cause of action into the ATS is, in any event, foreclosed by the Constitution. Under the Constitution, it is not for the courts to define violations of the law of nations. An explicit textual provision of the Constitution assigns to Congress the right to "define and punish . . . Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. Such explicit constitutional assignments of power to the three distinct branches of government are not aspirational. Rather, as the fundamental means by which the Constitution attempts to ensure proper balancing to achieve a democratic government, textual powers assigned to a particular branch may not be shifted from one branch to the other. *See Clinton v. City of New York*, 524 U.S. 417, 438-40 (1998). Where "[e]xplicit and unambiguous provisions of the Constitution prescribe and define" "just how [governmental] powers are to be exercised," the constitutional procedures must be followed with precision. *INS v. Chadha*, 462 U.S. 919, 945 (1983); *see also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring) (where an explicit textual provision exists,

"the balance" between the branches "already has been struck by the Constitution itself").

Thus, Congress may not delegate to the judiciary its textually assigned power to "define and punish . . . Offenses against the Law of Nations," and the statute should be interpreted to avoid such an unconstitutional construction. *See, e.g., Crowell v. Benson*, 285 U.S. 22, 62 (1932) (statutes to be construed to avoid raising serious constitutional questions where such a construction reasonably available).

Furthermore, under the Constitution, international relations are vested exclusively in the political branches. The ATS should not be construed in a manner that will require courts to stand in judgment of foreign nations for any and all alleged violations of international law. Rather, such sensitive political questions should be left in the hands of the political branches. "To have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Al-Odah*, 321 F.3d at 1148 (Randolph, J. concurring). Permitting the judiciary to assess which international law or treaty violations should give rise to a private cause of action – rather than limiting such causes of action to those select few that Congress has determined will positively enhance relations with foreign countries – has inherent potential to negatively impact foreign relations.

This Court should take the opportunity presented by this case to declare once and for all that the ATS does not provide a private cause of action.

C. If The ATS Creates A Cause Of Action, Review Is Necessary To Resolve The Appropriate Standards By Which To Measure Violations Of The Law Of Nations, An Issue On Which Courts Are Divided

Having read a cause of action into the ATS, the Ninth Circuit and other courts have been "forced to invent limiting principles" not justified by the language of the statute, in determining what violations of the law of nations are actionable. *Tel-Oren*, 726 F.2d at 820 (Bork, J., concurring). For example, the Ninth Circuit has declared that only violations of "specific, universal, and obligatory" international norms give rise to a cause of action under the ATS. *Alvarez-Machain*, 331 F.3d at 612 (citation omitted). As Judge Bork notes, such limitations "come[] out of nothing in the language of section 1350. According to that statute, jurisdiction exists as to any tort in violation of the law of nations." *Tel-Oren*, 726 F.2d at 820.

The decision below held that under the law of nations there is a "clear and universally recognized norm prohibiting arbitrary arrest and detention." *Alvarez-Machain*, 331 F.3d at 620. However, in reaching this conclusion, the Ninth Circuit relied on nonbinding U.N. resolutions and unratified or non-self-executing treaties. *Id.* Similarly, another panel of the Ninth Circuit relied on "recently-promulgated" standards of "ad hoc" international criminal tribunals to hold that corporations can be held civilly liable for aiding and abetting acts by foreign sovereigns. *Doe v. Unocal*, 2002 WL 31063976 at ** 24, 28 (9th Cir. Sept.18, 2002) (Reinhardt, J., concurring), *vacated and reh'g granted en banc*, 2003 WL 359787 (9th Cir. Feb. 14, 2003). As noted above, the Ninth Circuit's approach to identifying actionable violations of the law of nations under the ATS stands in direct conflict with the approach recently articulated by the Second Circuit in *Flores*, 343 F.3d at 160-172, which emphatically rejected reliance on such documents or ad hoc tribunals as authorita-

tive sources of international law.

In addition to leading to confusing or unpredictable standards, attempts by the Ninth Circuit and other courts to read the ATS to include evolving standards of international law is an impermissible exercise of judicial authority. In interpreting other, parallel provisions of the Judiciary Act, this Court has held that the statute's grant of jurisdiction extends only to those causes of actions recognized at the time of the enactment. For example, this Court recently reaffirmed that the Judiciary Act vests the federal courts with equity jurisdiction only insofar as that jurisdiction existed in 1789. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). In so holding, the Court reversed the Second Circuit's holding that the federal judiciary had jurisdiction over an equitable remedy that had not existed at the time the statute was originally enacted. In so doing, the Court rejected the "evolving standards" rationale that courts of appeals have similarly adopted in the context of the ATS.

Under the jurisdictional grant of the ATS, the federal courts have jurisdiction only over offenses against the "laws of nations" as that concept existed in 1789. Clearly, at that time, the "law of nations" recognized at least a limited class of violations, such as a violation of safe-conducts, infringement of an ambassador's rights, and piracy. *See* 4 William Blackstone, *Commentaries* 69 (Clarendon Press 1765-1769).

But just as clearly, the ATS's grant of jurisdiction over violations of the "law of nations" did *not* include arbitrary arrest or detention, or modern-day notions of international human rights law. At the time it was originally enacted, the "law of nations" vested rights *not* in individuals, but in nations. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422-23 (1964). The notion that international law protected individual rights did not come into existence until the mid- to late twentieth century – a century and a half after the

ATS was enacted.[7] The 1789 Congress could not have intended, when it granted jurisdiction over cases involving a violation of the "law of nations," that jurisdiction would encompass causes of actions involving violations of individual rights.

The nature of rights existing under the "law of nations" makes it unsurprising that for two centuries the ATS was not understood to empower courts to entertain cases involving violations of individual rights. To interpret the scope of jurisdiction in a manner contrary to the clear understanding of the framers of a two-hundred-year-old statute – and then to imply a cause of action from that statute where one does not clearly (or even obliquely) exist – would turn on their head the principles that courts are obliged to follow when they interpret statutes. *See Sandoval*, 532 U.S. at 286. The ATS did not vest the district court with jurisdiction over the claims asserted in this case, or in the current wave of cases against private companies for their overseas investments.

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[7] *See* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 79-80 (2000) (discussing traditional international law); *id.* at 85-86 (discussing new international law).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ MACHAIN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL FRATERNAL ORDER OF POLICE, and ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL FRATERNAL ORDER OF POLICE, and ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation, the National Fraternal Order of Police, and the Allied Educational Foundation respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. Petitioner has consented to the filing of this brief, as has the United States; their letters of consent have been lodged with the Court. Counsel for *amici* attempted to contact counsel for Respondent Humberto Alvarez-Machain by telephone for the purpose of seeking consent but was

unable to make contact, thereby necessitating the filing of this motion.

The Washington Legal Foundation ("WLF") is a nonprofit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF regularly appears before this Court and other federal courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Demore v. Kim,* 123 S. Ct. 1708 (2003); *Padilla v. Rumsfeld,* No. 03-2235 (2d Cir., dec. pending). WLF has appeared in several cases to discuss its view that an overly expansive interpretation of the Alien Tort Statute, 28 U.S.C. § 1350, not only is inconsistent with congressional intent but also threatens to undermine American foreign policy interests. *See Al Odah v. United States,* 321 F.3d 1134 (D.C. Cir. 2003); *Doe v. Unocal Corp.,* No. 00-56603 (9th Cir., dec. pending).

The National Fraternal Order of Police is the nation's largest law enforcement labor organization, with over 310,000 members. Members of F.O.P. have a strong interest in ensuring that they not be subject to damage suits under the Alien Tort Statute when they assist federal law enforcement officials in the apprehension of those indicted for alleged violations of federal criminal law.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the Supreme Court on a number of occasions.

The *en banc* Ninth Circuit ruled that nonresident alien criminals who are apprehended in a foreign country pursuant to a valid indictment from a United States court may sue for money damages both the United States government and those retained by the government to assist with the apprehension. *Amici* are concerned that that ruling will undermine both law enforcement efforts and national security; in particular, they are concerned that the ruling, by allowing alien criminals to second-guess law enforcement activities authorized by the Executive Branch, will severely damage the government's ability to combat international terrorism.

For the foregoing reasons, the Washington Legal Foundation, the National Fraternal Order of Police, and the Allied Educational Foundation respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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October 6, 2003

QUESTION PRESENTED

Amici curiae address only the first issue raised by the Petition:

Whether the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is simply a grant of jurisdiction, or whether, in addition to granting jurisdiction, it provides a cause of action upon which aliens may sue for torts in violation of the law of nations or treaties of the United States.

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BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL FRATERNAL ORDER OF POLICE, and ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation, National Fraternal Order of Police, and Allied Educational Foundation are set forth in the motion accompanying this brief.[1]

STATEMENT OF THE CASE

WLF hereby incorporates by reference the Statement of the Case contained in the Petition for a Writ of Certiorari.

In brief, the Ninth Circuit affirmed an award of damages against Petitioner because, at the request of officials of the United States government, he assisted in the apprehension in Mexico of a Mexican citizen who had been indicted for murder by a federal grand jury. The Ninth Circuit held that by adopting 28 U.S.C. § 1350 in 1789,[2] Congress intended to authorize a federal court to: (1) hear tort claims by aliens with respect to events occurring outside the United States; (2) ascertain the scope of customary international law at the time those events occurred; (3) determine whether the actions of those carrying out law enforcement duties at the behest of

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

[2] Variously referred to as the Alien Tort Statute ("ATS"), the Alien Tort Act, and the Alien Tort Claims Act.

American law enforcement officials violated that customary international law; and (4) award damages against those individuals if the court determines that customary international law prohibited American law enforcement officials from authorizing the actions taken.

This case arises out of the investigation into the February 1985 murder of Enrique Camarena-Salazar, an American citizen and agent of the Drug Enforcement Administration ("DEA"). Camarena was tortured and murdered in a house in Guadalajara, Mexico by members of a Mexican drug cartel. Respondent Humberto Alvarez-Machain was at the house while the torture was taking place.

In January 1990, Alvarez-Machain was indicted for the torture and murder of Camarena, and a federal court in California issued a warrant for his arrest. After informal discussions with Mexican officials failed to produce an agreement that Alvarez-Machain be detained by Mexico and turned over to American authorities, the Deputy Administrator of the DEA authorized a plan to apprehend Alvarez-Machain without the involvement of the Mexican government. Petitioner Jose Sosa (a former Mexican police official) and other Mexicans were hired to apprehend Alvarez-Machain. They did so on April 2, 1990; within 24 hours, they had placed him on a private plane and delivered him to DEA agents in El Paso, Texas. The district court found that during that 24 hour period, neither Sosa nor anyone else abused or otherwise harmed Alvarez-Machain.

Alvarez-Machain stood trial for murder in 1992. At the close of the government's case, the district court granted his motion for acquittal. In 1993, he filed this action against the

United States, Sosa, and various other individuals.[3] Among the tort claims against Sosa were claims for kidnapping and arbitrary detention. In March 1999, the district court granted summary judgment against Sosa on those claims, finding *inter alia* that those claims were actionable under the Alien Tort Statute. Pet. App. 176a-219a. After trial, the district court found in favor of Sosa and against Alvarez-Machain on other tort claims, and awarded $25,000 to Alvarez-Machain on his kidnapping and arbitrary detention claims under the ATS. *Id.* 140a-175a.

On appeal, a Ninth Circuit panel affirmed the judgment against Sosa on the ATS claims. Pet. App. 109a-139a.[4] On rehearing *en banc*, the appeals court (by a vote of 6-5) once again affirmed the judgment and issued a decision that largely mirrored the panel decision. *Id.* 1a-108a. The majority reaffirmed a prior decision, in *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), that the ATS both: (1) grants subject matter jurisdiction to the federal courts to hear claims alleging violations of customary international law; and (2) authorizes a private right of action for damages by aliens injured by such violations, at least to the extent that the defendant has violated "international norms that are specific, universal, and obligatory." *Id.* 9a-10a. The Ninth Circuit held that it was the province of the courts to determine what those universal "international norms" were, and that they need not defer to the Executive Branch's determination that an international norm is not universally accepted. *Id.* 24a-25a n.15. The appeals court went on to determine that, despite the

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[3] Only the claims against the United States and Sosa are still at issue.

[4] The panel also reinstated Alvarez-Machain's claims against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346, reversing the district court's dismissal of those claims. *Id.*

DEA's explicit authorization of his conduct and despite numerous similar instances of arrests by American law enforcement authorities in foreign countries without the consent of the local government, Sosa had violated "international norms that are specific, universal, and obligatory" by arresting Alvarez-Machain and detaining him for less than 24 hours. *Id.* 25a-44a.

In a dissent joined by three other judges, Judge O'Scannlain accepted (based on prior circuit precedent) that the ATS provided aliens with a right of action for violations of customary international law, at least in some instances. *Id.* 73a n.2. However, he argued that Alvarez-Machain was not entitled to relief because the United States does not subscribe to any "norm" that prohibits apprehension of indicted criminal suspects outside the borders of the United States, and "no claim can be actionable under the ACTA based on a norm to which the United States does not subscribe." *Id.* 73a-74a. He stated that there was "no basis in our nation's laws for this bewildering result" and warned that "the implications for our national security" are "ominous." *Id.* 73a.

In a separate dissent, Judge Gould argued that because the case implicated a matter "directly affecting the United States's relations with a foreign nation" and because "our Constitution entrusts the conduct of our nation's foreign policy to Congress and to the executive branch, this case poses a political question decidedly inappropriate for judicial review." *Id.* 97a.

REASONS FOR GRANTING THE PETITION

This case raises national security issues of exceptional importance. Over the past 20 years, three federal circuits -- the Second, Ninth, and Eleventh Circuits -- have asserted the

power to adjudicate the tort claims of aliens who allege that they have been injured as a result of alleged violations of customary international law. They have asserted this right even when the alleged violations occur outside the United States, even when Congress has never ratified the international law sought to be enforced, and even when (as here) the alleged violation consists of conduct explicitly endorsed by senior members of the Executive Branch. The sole basis for this assertion of judicial power is the ATS, a 1789 statute that was moribund for two centuries before suddenly being rediscovered by the Second Circuit in 1980.

The number of suits being filed under the ATS has increased rapidly in recent years. That increase has spawned criticism of this new ATS jurisprudence, both within the judiciary[5] and among legal commentators.[6] Indeed, the Second Circuit recognized only one month ago that uncertainty regarding the propriety of this ATS jurisprudence continues, primarily because this Court has never ruled on "the intended purpose and scope" of the ATS. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, ___, 2003 U.S. App. LEXIS 18098 at *20-21 (2d Cir. 2003).

One cannot overestimate the threat that the Ninth Circuit's decision poses to the federal government's efforts to

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[5] *See, e.g., Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 798-823 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied,* 470 U.S. 1003 (1985); *id.* at 823-827 (Robb, J., concurring); *Al Odah v. United States,* 321 F.3d 1134, 1145-50 (D.C. Cir. 2003) (Randolph, J., concurring).

[6] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 Harv. L. Rev. 815 (1997); William R. Castro, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations,* 18 Conn. L. Rev. 467 (1986).

wage the ongoing war on terrorism. The majority claimed that it was issuing a "limited" decision that did not "speak to . . . the capacity of the Executive to detain terrorists or other fugitives under circumstances that may implicate our national security interests." Pet. App. 4a. Rather, the majority claimed, its decision dealt only with an effort to enforce the criminal laws -- an effort the appeals court contrasted with the federal government's apprehension (in Afghanistan) and detention without trial of alleged Taliban fighter Yaser Esam Hamdi. *Id.*

But as Judge O'Scannlain persuasively argues, the Ninth Circuit's decision cannot be so easily cabined. The decision applies by its terms to an effort by the Executive Branch to apprehend an indicted criminal residing in a country that either lacks a functioning government or has a government not on friendly terms with the United States. Any such effort is now subject to second-guessing in the courts when the Executive Branch proceeds under its powers to enforce the criminal laws rather than under its war powers.

Review is also warranted because the Ninth Circuit's interpretation of the ATS is so at odds with the language of that statute. Under any commonsense reading of the ATS, the statute does nothing more than to grant jurisdiction to the federal courts to hear a limited category of claims. Contrary to the Ninth Circuit's interpretation, nothing in the language or history of the ATS suggests that it was intended to authorize a private right of action for damages by aliens injured by violations of the law of nations or of a treaty of the United States. Because the ATS does not create a private right of action, Alvarez-Machain's ATS claims against Sosa should have been dismissed for failure to state a claim.

Moreover, review is also warranted to review an alternative basis for the movement to permit judicial enforcement of customary international law. Some decisions, particularly those in the Second Circuit, have not based such enforcement on a holding that the ATS creates a private right of action. Rather, they assert that customary international law is part of "the common law of the United States," and that the ATS provides jurisdiction for a right of action implied under that common law. *Filartiga v. Pena-Irala,* 630 F.2d 876, 885-87 (2d Cir. 1980). The Ninth Circuit has occasionally taken its cue from the Second Circuit on ATS issues and has repeatedly cited *Filartiga* in support of its ATS decision. Accordingly, a ruling from this Court holding no more than that there is no right of action under the ATS could have limited impact in the Ninth Circuit, given its broad interpretation of the ATS's jurisdictional grant. Even in the absence of a right of action under the ATS, the Ninth Circuit may be inclined to reach the same result by implying a right of action under federal common law. Whether customary international law can be enforced in the federal courts because it is part of the federal common law is an issue subsumed within Question 1 presented by the Petition and ought to be addressed by the Court.

I. REVIEW IS WARRANTED BECAUSE THE RULING BELOW THREATENS TO UNDERMINE OVERSEAS LAW ENFORCEMENT, INCLUDING EFFORTS TO COMBAT TERRORISM

In barring federal court suits by nonresident aliens seeking to challenge their military detention, the Court recognized that permitting such suits would effectively undermine the ability of military commanders to wage war:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

Allowing ATS suits of the type permitted by the Ninth Circuit is likely to have a similar negative effect on overseas law enforcement efforts. By allowing both the United States and law enforcement officials to be haled into court and subjected to damage claims by a nonresident alien based on their overseas law enforcement activities, the Ninth Circuit could not have devised a better way to undermined those activities. The Court should grant review to determine whether Congress really had these types of suit in mind when it adopted the ATS.

Alvarez-Machain does not contest that he was lawfully indicted for a crime to which Congress unquestionably intended to give extraterritorial effect: the murder of a federal law enforcement official. Yet the result of the Ninth Circuit's ruling is to interfere significantly with the United States's ability to take into custody those criminal suspects who live in one of the many countries from which extradition is highly problematic. For example, in 1990 without the permission of the Panamanian government headed by Manuel Noriega, United States officials entered Panama, arrested Noriega on drug-related charges, and returned him to the United States for trial. *See United States v. Noriega,* 117 F.3d 1206 (11th Cir.

1997). Noriega was convicted and remains imprisoned in this country. But under the Ninth Circuit's interpretation of the ATS, the United States and others involved in his abduction and detention would be answerable to Noriega in a damages action for violation of customary international law.

Similarly, after murdering several individuals outside the CIA headquarters in Virginia in 1993, Mir Aimal Kasi fled to Pakistan and Afghanistan. In 1997, FBI agents abducted Kasi from a hotel in Pakistan and returned him to the United States for trial -- where he was sentenced to death for his crimes. *Kasi v. Angelone,* 300 F.3d 487 (4th Cir. 2002). Not only does the Ninth Circuit decision suggest that Kasi (or his estate) could sue the United States for damages for his abduction, but also that the amount of damages awarded could be huge -- someone whose allegedly illegal abduction leads to his execution is likely to have large damage claims.

The Ninth Circuit argued that its decision was "a limited one" because it only applies to enforcement of the criminal laws, not to military actions that "may implicate our national security interests." Pet. App. 4a. But as Judge O'Scannlain points out, that line is not so easily drawn. While the Ninth Circuit appears to give a pass to military commanders:

> One of the many vexing questions implicated by its opinion, but left unanswered by the majority, is what are we to make of sub-agencies within the Department of Homeland Security, as well as the Federal Bureau of Investigation ("FBI"), the Drug Enforcement Administration ("DEA"), the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), and other law enforcement agents who aid and assist in the war against terrorism and efforts to protect homeland security by capturing known terrorists and criminals in foreign locales across the

> globe? Unless the majority believes that every use of transborder arrest by the Executive branch falls within "its power to detain under the war powers of Article II," *supra* at 609 [Pet. App. 4a] (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003)) -- which is obviously not the case -- no rational observer can honestly say that our holding today "is a limited one."

Pet. App. 72a n.1.

The abduction and detention of Alvarez-Machain was approved in advance by the Deputy Administrator of the DEA. The Ninth Circuit suggested in its opinion that Alvarez-Machain *might* not have had a valid cause of action if his abduction had been approved at a higher level. But the appeals court never indicated the precise level from which approval must come before Alvarez-Machain would no longer have been permitted to recover under the ATS. Indeed, at various points the appeals court suggested that it would accept nothing less than an *explicit* grant of extraterritorial arrest powers from Congress to the precise sub-agency involved in the arrest. *See, e.g., id.* at 41a-42a.

The broad yet vague standards established by the Ninth Circuit ensure that large numbers of past and future extraterritorial arrests made under the direction of various law enforcement agencies will be challenged by means of ATS suits for damages. As Judge O'Scannlain makes clear, there is no way to cabin the Ninth Circuit's decision to ensure that none of those suits will be ones related to arrests made in connection with the war on terror. Accordingly, review is urgently needed to determine whether Congress really intended to hamstring law enforcement activities in this manner.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S INTERPRETATION OF THE ATS IS SO AT ODDS WITH THE LANGUAGE OF THAT STATUTE

The ATS, adopted by Congress in 1789, provides, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Ninth Circuit held that the ATS not only grants jurisdiction to the district courts, but also provides aliens with a right of action for torts "committed in violation of the law of nations or a treaty of the United States."

That interpretation is plainly at odds with the clear meaning of the ATS, which speaks explicitly in terms of granting "original jurisdiction" and says nothing about the creation of causes of action. The Court should grant review of the decision below to address that discrepancy, particularly in light of the conflict between the Ninth Circuit's decision and the opinions of several judges on the District of Columbia Circuit. *See, e.g., Tel-Oren,* 726 F.2d at 798-823 (Bork, J., concurring).[7]

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[7] In its most recent ATS decision, the Second Circuit acknowledged a conflict between the D.C. Circuit on the one hand and the Second, Ninth, and Eleventh Circuits on the other hand on the ATS right-of-action issue:

> The rejection of *Filartiga*'s understanding of the ATCA by two of the three judges on the *Tel-Oren* panel suggests that the law of the District of Columbia Circuit stands in contrast to that of our Circuit and the other Circuits that have followed our holding in *Filartiga*. *See Al Odah,* 321 F.3d at 1146 (Randolph, J., concurring) ("The meaning of § 1350

(continued...)

Essentially moribund for nearly two hundred years, *see Tel-Oren*, 726 F.2d at 812-13 & n.21 (Bork, J., concurring), the ATS was given life by the Second Circuit in *Filartiga*, a case involving claims filed in federal court by citizens of Paraguay against a Paraguayan police officer for his alleged torture of their relative. Despite concluding that the ATS is a jurisdictional statute that did not necessarily create any substantive federal rights, the Second Circuit nevertheless held that, at least where the ATS is invoked as the statutory basis for subject-matter jurisdiction, a tort claim for the violation of an established norm of customary international law (including human rights law) arises under federal law. *Filartiga*, 630 F.2d at 887. This is so, according to the Second Circuit, because customary international law is part of "the common law of the United States." *Id.* at 885-87.

Following the decision in *Filartiga,* several courts have agreed that alleged violations of international human rights law state claims for relief under federal law. *See Hilao,* 25 F.3d at 1475-76; *Abebe-Jira v. Negewo,* 72 F.3d 844, 847-48 (11th Cir. 1996). *But see Tel-Oren*, 726 F.2d 774, 775 (per curiam) (holding, without a majority rationale, that *Filartiga*- style claims are not justiciable in federal court).

However, whereas *Filartiga* viewed such claims as arising, without congressional authorization, from "the common law of the United States," *see Filartiga,* 630 F.2d at

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[7](...continued)
has been an open question in our court. But what § 1350 does not mean has been decided. In the *Tel-Oren* case both Judge Bork and Judge Robb, in their separate concurring opinions, rejected the Second Circuit's *Filartiga* decision . . . ." (internal citations omitted).

Flores, 343 F.3d at ___, 2003 U.S. App. LEXIS 18098 at *30.

887 (noting that ATS does "not . . . grant[] new rights to aliens" but provides jurisdiction over "rights already recognized" by a federal common law of international law), most other courts, including the Ninth Circuit, concluded that the ATS creates a congressionally authorized statutory right of action, the contours of which are to be determined by the courts on a case-by-case basis. *See, e.g.,* Pet. App. 10a; *Hilao,* 25 F.3d at 1474-75; *Abebe-Jira,* 72 F.3d at 848. Under these rulings, the ATS is treated as resembling other statutes that create a general right of action but leave to the courts the task of filling in the details in common-lawmaking fashion. *Cf., e.g., Nat'l Society of Professional Engineers v. United States,* 435 U.S. 679, 688 (1978) (noting that Congress "expected the courts to give shape to the [Sherman Act's] broad mandate by drawing on common-law tradition"); *Kernan v. Am. Dredging Co.,* 355 U.S. 46, 432 (1958) (noting that with the Federal Employers' Liability Act, "Congress saw fit to enact a statute of the most general term, thus leaving in large measure to the courts the duty of fashioning remedies . . . in a manner analogous to the development of tort remedies at common law.").

The differing rationales of the Ninth Circuit (in the decision below) and the Second Circuit have led to the same result, *i.e.,* to the development by the courts of a body of federal international human rights law, enforceable by private plaintiffs in suits for money damages against both government officials and private actors.[8] Both rationales, however, are fundamentally flawed and cannot withstand scrutiny.

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[8] The sources from which applicable rules are to be derived include the works of domestic and foreign jurists and commentators, international conventions, judicial decisions, and the practice of nations. *See Filartiga,* 630 F.2d at 880-81; Pet. App. 24a-25a n.15.

Contrary to the Ninth Circuit's holding that the ATS "creates a cause of action," Pet. App. 10a, the ATS is merely a jurisdictional statute that does not create any substantive rights. This is evident both from the statute's plain text and historical context.[9] While Congress *could* have enacted legislation creating a general cause of action for violations of international law, the Alien Tort Statute is assuredly not such legislation. Indeed, as this Court has observed, "it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States" an exercise of Congress's Article I powers to create substantive rights and liabilities. *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443, 452 (1851).

The Court consistently has refused to find substantive federal law lurking in the confines of similarly phrased jurisdictional statutes. For example, the Court rejected the argument that substantive federal law is created by § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, which provides (in language paralleling that of the Alien Tort Statute), "The district courts of the United States . . . shall have exclusive jurisdiction of violations of" the federal securities laws. The Court stated:

> Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the [law] which they seek to enforce, not in the jurisdictional provision.

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[9] *See* U.S. Br. 16-19. By its terms, the ATS vests federal courts with "original jurisdiction" over a particular type of action; it does not purport to *create* any private cause of action.

Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979).

Perhaps the surest indication that the ATS was intended merely to provide jurisdiction for substantive rights created elsewhere is that one year after passage of the ATS, Congress invoked its authority under Article I, Section 8, Clause 10 of the Constitution[10] to define and punish violations of the "Law of Nations." Congress defined such violations in the precise manner that had been set forth by Blackstone several decades earlier. Act of Apr. 30, 1790, ch. 9, §§ 8-13, 25-28, 1 Stat. 113-115, 117-18; *see* 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 68, 72 (1769) ("the principal offence against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and 3. Piracy.").[11] Adoption of the 1790 legislation would have been superfluous if the ATS itself created a cause of action to enforce the law of nations. Because the Ninth Circuit's ruling that the ATS creates a private cause of action is so at odds with the text of the ATS, the Court should grant jurisdiction to consider the issue.

The Court should *also* include within the scope of its review whether customary international law is part of the

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[10] The Constitution grants Congress the power to "define and punish . . . Offences against the Law of Nations." U.S. Const., art. I, § 8, cl. 10.

[11] The 1790 legislation's focus on protecting the rights of ambassadors in consistent with the views of historians who suggest that the primary purpose behind the ATS was ensuring that the rights of ambassadors were enforceable in federal courts. *See, e.g.,* William R. Castro, *The Federal Courts' Jurisdiction over Torts Committed in Violation of the Law of Nations,* 18 Conn. L. Rev. 467, 490-94 (1986). Castro suggests that the Founders were concerned about the rights of ambassadors in light of two high-profile assaults on ambassadors in the 1780s. *Id.*

common law of the United States, and whether the ATS provides jurisdiction for a right of action implied under that common law. As noted above, the Second Circuit in *Filartiga* employed that alternative theory for authorizing suits to enforce customary international law in the federal courts. *Filartiga* held that the scope of the this common law right continues to expand as the modern understanding of customary international law continues to expand. *Filartiga*, 630 F.2d at 881 ("It is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.").[12] The Ninth Circuit has cited approvingly to *Filartiga* on a number of occasions. If the Ninth Circuit continues to look to *Filartiga* for guidance, then a ruling from this Court that there is no right of action under the ATS may have limited impact. Even in the absence of a right of action under the ATS, the Ninth Circuit may be inclined to reach the same result by implying a right of action under federal common law -- the very approach suggested by the Second Circuit. *Filartiga,* 630 F.2d at 887.

Review is warranted on this issue both because the contemporary evidence suggests that Congress embraced a more limited view of the jurisdiction created by the ATS and because the Second Circuit has adopted an extremely outdated view of federal common law. Contrary to the holding of *Filartiga,* there is not a self-executing "common law of the

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[12] If customary international law really is part of "the common law of the United States," and is enforced pursuant to an implied right of action, it is difficult to understand what continued relevance the ATS plays in the jurisdiction of the federal courts. Now that Congress has granted the federal courts general federal question jurisdiction (28 U.S.C. § 1331), courts would automatically possess jurisdiction over customary international law under § 1331 the moment it was determined that customary international law is part of the federal common law.

United States," pursuant to which the federal courts may create and enforce private rights of action for torts alleged to violate the norms of customary international human rights law. The Second Circuit's holding in *Filartiga* was premised on that court's misreading of several nineteenth-century cases that applied "general federal common law" to transitory common-law claims in a manner that was repudiated by this Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 78 (1938).

Filartiga's claim that international law is part of "the common law of the United States" and therefore "aris[es] under . . . the Laws of the United States," 630 F.2d at 885-87, conflicts with the long-standing and repeated assertions of the Court that international law that has not been codified in a statute or an enforceable treaty does not present a federal question or arise under federal law. *See, e.g., N.Y. Life Ins. Co. v. Hendren,* 92 U.S. 286, 286-87 (1875) (the Court lacks jurisdiction to review "the law of nations applicable to this case" because that law does not involve "the constitution, laws, treaties, or executive proclamations, of the United States," and therefore does not present any Federal question"); *Ker v. Illinois,* 119 U.S. 436, 444 (1886) (claim of international law violation raises no federal question and "the decision of that question is . . . within the province of the State court, as a question of common law"); *Huntington v. Attrill,* 146 U.S. 657, 683 (1892) (noting that if a "question of international law" is decided in state court, "the Constitution and laws of the United States have not authorized" Supreme Court review of the decision). These cases make clear that before *Erie* (which held that "[t]here is no federal general common law," 304 U.S. at 78), international law (like the law of torts and contracts) had been deemed a part of the federal general common law, which, though not itself raising a federal question, provided the rule of decision for federal courts that otherwise had jurisdiction over a case. *See Huntington,* 146 U.S. at 683 (explaining that

although international law is not federal law, if a "question of international law" arises in federal court, "it is one of those questions of general jurisprudence which the court must decide for itself").

The Second Circuit thus erred by taking out of context this Court's pre-*Erie* statements that international law "is part of our law" and "part of the law of the land." *Filartiga,* 630 F.2d at 887 (quoting *The Nereide,* 13 U.S. (9 Cranch) 388, 422 (1815), and *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Pronouncement about the law of nations, "our law," and "the law of the land" in the pre-*Erie* cases on which *Filartiga* relied involved an application of this older form of general common law and simply had no bearing on the actual question presented in *Filartiga, i.e.,* whether claims for torts in violation of uncodified customary international law arise under federal law. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARV. L. REV. 815 (1997).

In sum, because of serious flaws in both approaches employed by federal appeals courts to arrive at the conclusion that there exists a body of human rights tort law enforceable by private plaintiffs in the federal courts against both government officials and private actors, the Court should grant review on this issue.

CONCLUSION

Amici curiae Washington Legal Foundation, the National Fraternal Order of Police, and the Allied Educational Foundation respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that join to support the traditional understanding of the Alien Tort Claims Act.

Since 1978, the Lawyers Committee for Human Rights ("LCHR") has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. It supports human rights activists who fight for basic freedoms and peaceful change at the local level; promotes fair economic practices by creating safeguards for workers' rights; protects refugees in flight from persecution and repression; works to ensure that domestic legal systems incorporate international human rights protections; and helps build a strong international system of justice and accountability for the worst human rights crimes. LCHR believes this case presents compelling issues of justice for victims of human rights.

The Rutherford Institute ("Institute") is a non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have appeared as counsel or submitted *amicus curiae* briefs before the United States Supreme Court and federal appeals courts in many significant civil liberties and human rights cases. Institute attorneys currently handle several hundred civil rights cases nationally at all levels of federal and state

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[1] Pursuant to Rule 37.2(a), all parties have consented by letter to the filing of this amici brief. Copies of the consent letters accompany the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

courts. The present case raises important human rights concerns, and so is of significance to the Institute.

ARGUMENT

The decision below is fully consistent with the decisions of other Courts of Appeals. There is no conflict among the Circuits on any of the questions presented in the petition and no other compelling reason for review. This Court has repeatedly denied petitions for writs of certiorari in Alien Tort Act (ATA) cases, *see, e.g.*, *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Hilao* v. *Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Trajano* v. *Marcos*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), and should deny the instant petition as well.

Enacted in 1789 as part of the First Judiciary Act, the ATA provides: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.[2] The federal courts have interpreted the ATA in a consistent and restrained

[2] The term "law of nations" was used until the early 20th century to refer to customary rules and obligations that regulated interactions between states and certain aspects of state interactions with individuals. It has now been supplanted by the term "customary international law." *See* Restatement (Third) of the Foreign Relations Law of the United States pt. I, ch. 1, Introductory Note (1987) [hereinafter Restatement (Third)].

manner, which Congress endorsed when it passed the Torture Victim Protection Act of 1991 (TVPA). Petitioner invites this Court effectively to repeal the ATA by engrafting onto it a cause-of-action requirement that was unknown at the time the ATA was passed. Such a repeal of the ATA would be contrary to the intent of the Congress that passed the ATA and of the Congress that passed the TVPA and would leave important questions of international law to the courts of the fifty states. Petitioner's "cause-of-action" argument has properly been rejected by every Court of Appeals to have considered it.

I. THE COURTS OF APPEALS ARE NOT DIVIDED ON THE PROPER REACH OF THE ATA AND HAVE DEVELOPED A CONSISTENT AND MANAGEABLE JURISPRUDENCE.

The Courts of Appeals have consistently limited jurisdiction under the ATA to torts that violate "well-established, universally recognized norms of international law." *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980). As *Filartiga* itself pointed out, this standard is a "stringent one," *id.* at 881, and claims that have failed to meet it have been readily dismissed. *See, e.g.*, *Alvarez-Machain* v. *United States*, 331 F.3d 604, 617-20 (9th Cir. 2003) (en banc) (holding that claim for transborder abduction does not meet ATA standard for jurisdiction); *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 172 (2d Cir. 2003) (holding that claims based on environmental pollution do not meet ATA standard for jurisdiction). By limiting jurisdiction to "universally recognized" norms, the federal courts have avoided imposing United States standards of conduct extraterritorially and have avoided unnecessary friction with foreign governments. Congress endorsed *Filartiga*'s approach when it passed the Torture Victim Protection Act of 1991 and has continued to expand the availability of federal courts to hear claims based on violations of international law.

A. The Courts Of Appeals Have Consistently Held That ATA Jurisdiction Is Limited To Well-Established, Universally Recognized Norms Of International Law.

In *Filartiga*, the Second Circuit held that the ATA conferred jurisdiction over torts such as official torture that violate "well-established, universally recognized norms of international law," 630 F.2d at 888, a standard to which the Second Circuit has adhered ever since. *See, e.g.*, *Flores*, 343 F.3d at 154 (citing *Filartiga* for the proposition that "customary international law [includes only] well-established, universally recognized norms of international law"); *Kadic*, 70 F.3d at 239 (stating that if "the defendant's alleged conduct violates 'well-established, universally recognized norms of international law,' then federal jurisdiction exists under the Alien Tort Act"); *Zapata* v. *Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam) (citing *Filartiga* for the proposition that the ATA applies only to "violations of universally recognized principles of international law"). This standard ensures that federal courts will apply only those international norms that are clearly accepted as binding by the community of nations. *See Filartiga*, 630 F.2d at 881 ("The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."). As the Second Circuit subsequently noted in *Kadic*, "*Filartiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." 70 F.3d at 249.

Other Circuits have consistently followed the approach set forth in *Filartiga*. In *Hilao*, the Ninth Circuit

relied expressly upon *Filartiga* in holding that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." 25 F.3d at 1475; *see also Alvarez-Machain*, 331 F.3d at 612 ("In [*Hilao*] we were careful to limit actionable violations to those international norms that are 'specific, universal, and obligatory.'"); *Papa* v. *United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (noting that "plaintiffs must allege a violation of 'specific, universal, and obligatory' international norms as part of an ATA claim"); *Martinez* v. *City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) ("The applicable norm of international law must be 'specific, universal, and obligatory.'").

The Eleventh and Fifth Circuits have also echoed the *Filartiga* approach. In *Abebe-Jira*, 72 F.3d 844, the Eleventh Circuit held that torture was actionable under the ATA, citing case law from both the Second and Ninth Circuits. In *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999), the Fifth Circuit held that claims based on environmental damage were not actionable under the ATA because they did not meet the standard articulated by the Second Circuit. In neither case did the Court of Appeals express any concern about a conflict among the Circuits.

Petitioner does not and could not assert that there is any substantive difference between the "well-established, universally recognized" formulation used by the Second Circuit and the "specific, universal, and obligatory" formulation used by the Ninth. Rather, Petitioner asserts that in *Kadic* the Second Circuit limited ATA jurisdiction to violations of *jus cogens* norms. Pet. at 22-25.[3] While the

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[3] *Jus cogens* norms are a subset of international law norms from which no derogation is permitted. It is worth noting that the notion of *jus cogens* is of relatively modern origin and was unknown at the time the ATA was enacted. *See* Restatement (Third), *supra*, § 102, Reporters' Note 6.

claims in *Kadic* did involve *jus cogens* violations, the Court of Appeals in that case never suggested that jurisdiction under the ATA was limited to such claims. As Petitioner concedes, *Kadic* never even used the term "*jus cogens*." Pet. at 23, n.6. Neither does the Second Circuit's most recent decision under the ATA. *See Flores*, 343 F.3d at 140. And none of the cases decided since *Kadic* acknowledge the existence of a conflict among the Circuits on this point. The most charitable characterization of Petitioner's argument is that it mistakes a sufficient condition for a necessary one. But as the Court of Appeals observed in rejecting Petitioner's *jus cogens* argument below, "the fact that a violation of this subcategory of international norms is *sufficient* to warrant an actionable claim under the ATA does not render it *necessary*." *Alvarez-Machain*, 331 F.3d at 613.

In short, there is simply no dispute among the lower courts that the ATA confers jurisdiction over torts that violate well-established, universally recognized norms of international law. This Court should disregard Petitioner's attempt to create such a dispute by misreading the decisions of the Second Circuit.

B. Federal Courts Applying This Standard Have Distinguished Between Claims That Are Properly Brought Under The ATA And Those That Are Not.

Since *Filartiga*, the federal courts have engaged in a careful and measured analysis of the individual claims raised in ATA cases, hearing those claims that have been based on violations of well-established, universally recognized norms of international law and dismissing those claims that have not.

For example, the federal courts have recognized that the prohibition against genocide constitutes a well-established, universally recognized norm of international law. In *Kadic*, the Second Circuit found that allegations of

rape, forced impregnation, torture, and murder with the intent to destroy religious and ethnic groups in the territory of the former Yugoslavia clearly stated a violation of the international norm against genocide. 70 F.3d at 242. In *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), an association of religious and community groups alleged that defendants collaborated with the Sudanese government in a campaign of religious and ethnic cleansing against the non-Muslim population in southern Sudan. Not surprisingly, the district court found that such genocidal acts were clearly prohibited under international law and were subject to the ATA. *See also Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (claims based on genocide in Bosnia-Herzegovina); *Mushikiwabo* v. *Barayagwiza*, No. 94 CIV. 3267 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) (claims based on genocide in Rwanda). Federal courts have also recognized the viability of ATA suits for such well-established claims as torture[4] and summary execution.[5]

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[4] *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Hilao* v. *Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Trajano* v. *Marcos*, 978 F.2d 493 (9th Cir. 1992); *Presbyterian Church of the Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Tachiona* v. *Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Mehinovic* v. *Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Doe* v. *Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Xuncax* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Paul* v. *Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

[5] *Estate of Rodriquez* v. *Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Tachiona* v. *Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Estate of Cabello* v. *Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Xuncax* v. *Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti* v. *Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

At the same time, federal courts have firmly rejected claims that are not based on well-established, universally recognized norms of international law.[6] For example, federal courts have repeatedly dismissed ATA cases based on environmental harms. Most recently, in *Flores*, 343 F.3d at 140, the Second Circuit concluded after careful analysis that the alleged rights to life and health were insufficiently definite to constitute rules of customary international law and that customary international law did not prohibit intranational pollution. *See also Beanal*, 197 F.3d 161; *Sarei* v. *Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1160-61 (C.D. Cal. 2002); *Amlon Metals, Inc.* v. *FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991). Courts have also dismissed a panoply of other ATA actions that failed to raise recognized claims under international law such as fraud,[7] negligence,[8] censorship,[9] commercial torts,[10] and conversion.[11]

[6] The federal courts have also dismissed claims involving well-established, universally recognized norms of international law when the pleadings fail to support the essential elements of the claim. *See, e.g.*, *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 168 (5th Cir. 1999) (genocide claim unavailable when pleadings "are devoid of discernable means to define or identify conduct that constitutes a violation of international law"); *Estate of Rodriquez* v. *Drummond Co.*, 256 F. Supp. 2d 1250, 1261 (N.D. Ala. 2003) (genocide claim unavailable where plaintiffs failed to allege that persecution was due to national, ethnic, racial, or religious reasons).

[7] *See Hamid* v. *Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995); *Tamari* v. *Bache & Co. S.A.L.*, 730 F.2d 1103, 1104 (7th Cir. 1984).

[8] *See Jones* v. *Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (S.D. Tex. 1989).

[9] *See Guinto* v. *Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986).

[10] *See De Wit* v. *KLM Royal Dutch Airlines*, 570 F. Supp. 613, 618 (S.D.N.Y. 1983); *Canadian Overseas Ores, Ltd.* v. *Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1347 (S.D.N.Y. 1982).

[11] *See Cohen* v. *Hartman*, 634 F.2d 318, 320 (5th Cir. 1981).

Indeed, even the decision below illustrates the ability of federal courts to apply the ATA's jurisdictional standard and determine which claims may be brought and which may not. For while the Ninth Circuit concluded that "there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention," *Alvarez-Machain*, 331 F.3d at 620, the court also *rejected* Respondent's claim based on transborder kidnapping, concluding that because the "right to be free from transborder abductions has not reached a status of international accord sufficient to render it 'obligatory' or 'universal,' it cannot qualify as an actionable norm under the ATCA." *Id.*[12]

Petitioner also mistakenly suggests that courts applying the ATA have improperly relied upon non-self-executing treaties and the writings of law professors. Pet. at 19-20. In fact, the federal courts have consistently followed this Court's "directive that the law of nations 'may be ascertained by consulting the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Alvarez-Machain*, 331 F.3d at 617 (quoting *Smith* v. *United States*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). Courts have not allowed ATA plaintiffs to bring suits under non-self-executing treaties. Rather, they have looked to *widely accepted* treaties as *evidence* of customary international law. *See, e.g.*, *Kadic*, 70 F.3d at 238 n.1; *Filartiga*, 630 F.2d at 880 n.7, 882-84. As the Second Circuit recently explained:

> All treaties that have been ratified by at least two States provide *some* evidence of the custom and practice of nations. However, a treaty will

[12] *Amici* take no position on whether Respondent's claims satisfy the jurisdictional standard of the ATA, but simply note that Petitioner has alleged no conflict among the Circuits on this question and that it is not independently worthy of this Court's attention.

> only constitute *sufficient proof* of a norm of customary international law if an overwhelming majority of States have ratified the treaty, *and* those States uniformly and consistently act in accordance with its principles.

Flores, 343 F.3d at 162-163. With respect to the writings of law professors, courts applying the ATA have from the very beginning followed this Court's instructions and consulted them "'not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.'" *Filartiga*, 630 F.2d at 881 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *see also Flores*, 343 F.3d at 171.

The experience of more than twenty years shows that the federal courts have had little difficulty determining the contours of customary international law or distinguishing claims that are based on well-established, universally recognized norms from those that are not.

C. Claims Under The ATA Do Not Involve The Extraterritorial Application Of United States Law.

In his Petition for Certiorari, Petitioner makes the novel argument that the presumption against extraterritoriality applies to the ATA. No lower court has ever addressed this argument and this Court should decline Petitioner's invitation to be the first to do so.

The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Courts hearing claims under the ATA, however, are not applying "our laws" extraterritorially. Rather, they are applying "well-established, universally recognized norms of international law," *Filartiga*, 630 F.2d at 888, that apply throughout the world.

Petitioner's suggestion that the presumption against extraterritoriality applies not just to limit the application of United States domestic law abroad but whenever a case arises abroad would be contrary to the understanding of the First Congress. Since *Mostyn* v. *Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774), it has been established that actions for tort (other than trespass upon real property) are transitory and may be brought wherever the tortfeasor is found. *See generally McKenna* v. *Fisk*, 42 U.S. (1 How.) 241, 247-49 (1843) (discussing the doctrine of transitory torts).[13] The contemporaneous understanding of how the presumption against extraterritoriality applied to domestic legislation on the one hand and to the ATA on the other is demonstrated in a 1795 Attorney General's *Opinion concerning actions that might be taken against Americans who had aided the French in attacking the British colony of Sierra Leone*. 1 Op. Att'y Gen. 57 (1795). Attorney General Bradford first opined that United States criminal legislation did not apply to actions in a foreign country. *Id.* at 58. He then continued:

> But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States. . . .

Id. at 59. In short, the presumption against extraterritoriality has no bearing on suits under the ATA.

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[13] Under well-established conflict-of-laws rules, United States courts routinely decide cases that arise abroad under foreign law. Petitioner's suggestion that the presumption against extraterritoriality applies whenever the dispute arises abroad would throw the field of conflicts into turmoil.

D. Claims Under The ATA Do Not Improperly Interfere With The Political Branches' Ability To Conduct Foreign Affairs.

Petitioner further suggests that suits under the ATA interfere with the ability of the political branches to conduct foreign affairs. Pet. at 15-21. The judgment of the State Department and the Department of Justice when the *Filartiga* case was before the Second Circuit was quite different. In a memorandum submitted to the Second Circuit, the United States wrote:

> [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. . . . When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.

Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, *reprinted in* 19 I.L.M. 585, 604 (1980). If the experience since *Filartiga* had demonstrated that this view was mistaken, Congress could have limited ATA suits to address foreign policy concerns.

Instead, Congress has endorsed the *Filartiga* line of cases and has chosen to expand the availability of federal courts as forums for violations of international law. In 1991, Congress enacted the TVPA, which codifies the right of aliens to sue for official torture and extrajudicial killing. Pub. L. No. 102-256, 106 Stat. 73 (1992), (codified at 28 U.S.C. § 1350 note). Both the House and Senate Reports endorsed *Filartiga*, noting that the decision had "met with

general approval." H.R. Rep. No. 102-367 (I), at 86, reprinted in 1992 U.S.C.C.A.N. 84 (Nov. 25, 1991) [hereinafter House Report]; S. Rep. No. 102-249, 1991 WL 258662 (Leg. Hist.) at 4 (Nov. 26, 1991) [hereinafter Senate Report]. Furthermore, in enacting the TVPA, Congress chose to expand the use of federal courts to enforce international law by extending the right to sue for torture and extrajudicial killing to citizens. Shortly after enacting the TVPA, Congress moved again in the Antiterrorism Act of 1991 to grant United States nationals injured by international terrorism the right to sue for treble damages. 18 U.S.C. § 2333. And in 1996, Congress authorized the federal courts to hear still more international suits in the Antiterrorism and Effective Death Penalty Act, which amended the Foreign Sovereign Immunities Act to permit suits for torture and extrajudicial killing against state sponsors of terrorism. 28 U.S.C. § 1605(a)(7).

As Chief Judge Walker has observed,

> [The ATA] is simply an act of Congress. If it raises valid policy concerns and if adjudication under it leads to real-world problems for the executive or the legislature, it may be amended, or even repealed. The fact that Congress has not done so, and, indeed, appears to have endorsed the *Filartiga* approach in the legislative history of the Torture Victim Protection Act, indicates that the substantial concerns that have been voiced are, at least at this point, largely theoretical.

John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 St. Louis U. L.J. 539, 560 (1997).

II. THE COURTS OF APPEALS HAVE UNANIMOUSLY AND CORRECTLY REJECTED PETITIONER'S ARGUMENT THAT A SEPARATE CAUSE OF ACTION SHOULD BE REQUIRED.

Petitioner concedes that there is no conflict among the Circuits over whether a separate cause of action is required to bring suit under the ATA. Pet. at 8. Indeed, the Second, Ninth, and Eleventh Circuits have unanimously agreed that no separate cause of action is required. *Abebe-Jira*, 72 F.3d at 847; *Kadic*, 70 F.3d at 241; *Hilao*, 25 F.3d at 1475. The only contrary opinion is found in the concurring opinions of Judge Bork in *Tel-Oren*, 726 F.2d at 801 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985), and Judge Randolph in *Al Odah* v. *United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (Randolph, J., concurring), who agreed with Judge Bork. As the United States has previously told this Court, however, the opinions in *Tel-Oren* have "little, if any, precedential value." United States Brief Submitted to Supreme Court in Response to Court's Invitation in Reviewing Petition for a Writ of Certiorari, *reprinted in* 24 I.L.M. 427, 432 (1985).

Petitioner's cause-of-action argument would effectively repeal the ATA by engrafting onto it a requirement that was unknown at the time the ATA was passed. Repealing the ATA in this way would be contrary to the intent of the Congress that passed the ATA in 1789 and of the Congress that passed the TVPA in 1991 and would leave important questions of international law to the potentially conflicting decisions of state courts.

A. Petitioner's Cause Of Action Argument Rests On An Anachronism and Would Make the ATA Meaningless.

This Court should not assume that the First Congress intended to enact a statute that was meaningless. But if Petitioner is correct that a separate cause of action was

required for suits under the ATA, that statute would have been a nullity the moment it was passed. In 1789, the violations of international law that the First Congress probably had in mind were those Blackstone had identified as "[t]he principal offences against the law of nations . . . ; 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors [sic]; and 3. Piracy." 4 William Blackstone, Commentaries *68.[14] A highly publicized assault on the French ambassador in 1784 is thought to have been the specific impetus for including this provision in the First Judiciary Act. *See* Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 469-70 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-94 (1986); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1, 24-27 (1985). Yet no statute created a separate cause of action for these violations of the law of nations or any others,[15] and even Judge Bork was forced to acknowledge that a separate cause of action should not be required

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[14] In 1781, the Continental Congress had specifically listed the first two offenses in a resolution recommending that the States enact laws to punish infractions of the law of nations and to authorize suits for damages by the injured party. Resolution of Nov. 23, 1781, 21 Journals of the Continental Congress 1774-1789, at 1136-37.

[15] In a brief that Petitioner has appended to his Petition, the Department of Justice suggests that a 1790 statute criminalizing piracy, violations of the rights of ambassadors, and violations of safe-conducts provided the necessary cause of action for these offenses. Brief Amicus Curiae United States at 10-12, *Doe I* v. *Unocal Corp.* (9th Cir. filed May 8, 2003) (Nos. 00-56603, 00-56628) (en banc). Under this Court's jurisprudence, however, criminal statutes are not sufficient to grant civil causes of action. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 284 (1979).

for piracy, assaults on ambassadors, and violations of safe-conducts if the ATA were to have any meaning. *Tel-Oren*, 726 F.2d at 813-14 & n.22.[16]

The First Congress passed no statutes granting a separate cause of action to bring suit under the ATA because that requirement was unknown at the time. The phrase "cause of action" became a legal term of art only in 1848, when the New York Code of Civil Procedure abolished the distinction between law and equity "and simply required a plaintiff to include in his complaint '[a] statement of the facts constituting the cause of action.'" *Davis* v. *Passman*, 442 U.S. 228, 237 (1979) (quoting 1848 N.Y. Laws, ch. 379, § 120(2)). In 1789, the law of nations was considered to be part of the common law,[17] and the First Congress expected "torts in violation of the law of nations" to be actionable at common law just as other torts were.

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[16] To limit the ATA to those violations that were recognized in 1789 would be contrary to the expectations of the First Congress, which understood that the law of nations evolves. *See, e.g.*, *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J., concurring) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); *United States* v. *La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.), *overruled on other grounds*, 23 U.S. (10 Wheat.) 66 (1825) ("It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations."). It would also be contrary to the text of the ATA, which does not enumerate specific torts but rather provides jurisdiction over "*any* civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added).

[17] *See, e.g.*, 4 Blackstone, *supra*, at *67 ("the law of nations . . . is . . . adopted in it's [sic] full extent by the common law, and is held to be a part of the law of the land"); *Respublica* v. *De Longchamps*, 1 U.S. 111, 116 (Pa. 1784) ("the law of Nations . . . , in its full extent, is part of the law of this State").

In short, Petitioner's argument rests on an anachronism. It would also defeat the intent of the First Congress, which expected torts in violation of the law of nations to be actionable at common law without any further congressional action.

B. Congress Rejected The Requirement Of A Separate Cause Of Action When It Enacted The Torture Victim Protection Act Of 1991.

Congress also rejected the requirement of a separate cause of action when it enacted the TVPA. After stating that the *Filartiga* case had "met with general approval," the House and Senate Reports noted that Judge Bork had "questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action." House Report, *supra*, at 86; *see also* Senate Report, *supra*, at 4-5. In passing the TVPA, Congress sided with *Filartiga* and against Judge Bork, reiterating the right of aliens to sue for torture and extrajudicial killing and "enhanc[ing] the remedy *already available* under section 1350 . . . [by] extend[ing] a civil remedy also to U.S. citizens who may have been tortured abroad." House Report, *supra*, at 86 (emphasis added); Senate Report, *supra*, at 5 (emphasis added). Lest its intent be misconstrued, both the House and Senate Reports further emphasized that "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350" and that the ATA "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." House Report, *supra*, at 86; *see also* Senate Report, *supra*, at 5. Engrafting a separate cause-of-action requirement onto the ATA would thus frustrate not just the intent of the First Congress but the intent of the 102d as well.

C. Repealing The ATA Would Leave Important Questions Of International Law To The Courts Of The Several States.

If suits for torts in violation of the law of nations cannot be brought in federal court, they will be brought in state court. After the district court in *Doe I* v. *Unocal Corp.* dismissed plaintiffs' ATA claims based on human rights abuses in Burma, plaintiffs refiled their claims in Los Angeles superior court, where proceedings are ongoing. *See Doe I* v. *Unocal Corp.*, No. BC 237980 (Cal. Super. Ct., County of L.A., filed Oct. 4, 2000), No. BC 237679 (Cal. Super. Ct., County of L.A., filed Sept. 29, 2000).[18]

The Framers of the Constitution were concerned that questions of international law not be left to the courts of the several states. As John Jay wrote in The Federalist:

> Under the national government, treaties and articles of treaties, as well as the law of nations, will always be expounded in one sense, and executed in the same manner – whereas adjudications on the same points and question, in thirteen States . . . will not always accord or be consistent. . . . The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to one national Government cannot be too much commended.

The Federalist No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961).

This Court has recognized that the ATA is one of a number of congressional enactments "reflecting a concern for uniformity in this country's dealings with foreign

[18] In the ATA suit, plaintiffs' appeal of the district court's dismissal is currently pending before an en banc panel of the Ninth Circuit. *See Doe I* v. *Unocal Corp.*, Nos. 00-56603, 00-56628 (9th Cir. en banc) (argued June 17, 2003).

nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964). If suits for violations of the law of nations were left to the state courts, the only way to maintain such uniformity would be through review by this Court.

In recent years, this Court has invalidated state initiatives in the human rights area that undermined the ability of the United States to speak with "one voice" in foreign affairs. In *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), this Court held that a Massachusetts law designed to promote human rights in Burma was preempted where Congress had enacted its own set of sanctions. Just last Term in *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374 (2003), this Court held that a California statute requiring disclosure of information about Holocaust-era insurance policies impermissibly interfered with federal authority over foreign affairs even in the absence of congressional action. It would be ironic if this Court were to accept Petitioner's invitation in this case to strip the federal courts of authority to hear suits for torts in violation of the law of nations – authority expressly granted by Congress in 1789 and reaffirmed in 1991 – and leave such suits for resolution by the courts of the fifty states.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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Supreme Court, U.S.
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(10)

No. 03-339

IN THE

Supreme Court of the United States

JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, provides as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The questions presented are:

1. Whether the ATS, is simply a grant of jurisdiction, or whether, in addition to granting jurisdiction, it provides a cause of action upon which aliens may sue for torts in violation of the law of nations or treaties of the United States, or authorizes federal courts to exercise federal common law-making powers to create federal remedies for such torts.

2. If it is proper to imply or create a cause of action under the ATS, whether those actions should be limited to suits for violations of international legal norms to which the United States has assented.

3. Whether a detention that lasts less than 24 hours, results in no physical harm to the detainee, and is undertaken by a private individual under instructions from senior United States law enforcement officials, constitutes a tort in violation of the law of nations actionable under the ATS.

PARTIES TO THE PROCEEDING

Petitioner José Francisco Sosa is a Mexican national resident in the United States under the federal witness protection program.

Petitioner's co-defendants in the proceedings below included the United States of America; Hector Bellerez, Bill Waters, Pete Gruden, Jack Lawn, and Antonio Garate-Bustamante, all individual employees and agents of the U.S. Drug Enforcement Agency for whom the United States was ultimately substituted as defendant; and five unnamed Mexican nationals in the federal witness protection program. They are all nominal respondents in this matter.

Respondent Humberto Alvarez-Machain is a Mexican national.

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OPINIONS BELOW

The opinion of the *en banc* court of appeals (Pet. App. 1a-108a) is reported at 331 F.3d 604 (9th Cir. 2003). The now-vacated panel opinion of the court of appeals (Pet. App. 109a-139a) is reported at 266 F.3d 1045 (9th Cir. 2001).

The March 18, 1999 (Pet. App. 176a-219a) and May 18, 1999 (Pet. App. 172a-175a) orders and the Sept. 9, 1999 judgment (Pet. App. 140a-171a) of the United States District Court for the Central District of California are unreported.

JURISDICTION

The judgment of the *en banc* court of appeals was entered on June 3, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 10 of the Constitution, which provides that:

> The Congress shall have Power . . . to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . .

2. Chapter 20, section 9 of An Act to Establish the Judicial Courts of the United States, 1 Stat. 73, 76-77 (1789), now codified as amended at 28 U.S.C. § 1350, which provides that:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

This case presents the fundamentally important question whether a private right of action for violations of evolving international legal norms can be implied under a law that, by its plain terms, simply confers jurisdiction on federal courts. By implying such a cause of action under the so-called Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, or by treating the ATS as an authorization to create federal common law remedies, the Ninth Circuit and several of its sister circuits have launched a misguided legal revolution. Attempting to fashion liability standards without any congressional guidance, they have opened U.S. courts to suits that interfere with political branch management of foreign affairs, that undermine Executive Branch efforts to protect the Nation's security, and that force courts to usurp the constitutional power of the political branches to decide which norms of international law should be binding and enforceable. Because the enacting Congress never intended the mere grant of jurisdiction to give rise to such untoward consequences—and in fact would have rebelled at the very idea—this Court should rule that a cause of action cannot be implied or created under the ATS, and thereby leave it to Congress to decide under what circumstances, if any, a cause of action should be enacted to enforce the law of nations.

STATEMENT OF FACTS

1. In the decision below, the Ninth Circuit, sitting *en banc*, ruled that respondent Humberto Alvarez-Machain, a Mexican national indicted in the United States for allegedly participating in the kidnapping, torture, and murder of a U.S. Drug Enforcement Agency ("DEA") agent, could recover damages under the ATS from petitioner José Francisco Sosa, a Mexican citizen who, at the DEA's request, helped apprehend and transport respondent from Mexico to Texas so that he could be prosecuted.

In February 1985, DEA agent Enrique Camarena-Salazar was kidnapped, tortured, and murdered in Guadalajara, Mexico. Respondent admitted that he was present at the location where those crimes occurred during the time Camarena was being held. In January 1990, a federal grand jury in Los Angeles indicted respondent for participating in the crimes against Camarena, and a warrant was duly issued for his arrest.

In early 1990, the Deputy Administrator of the DEA approved a plan to have Mexican nationals apprehend respondent in Mexico and deliver him to the United States to face trial. Petitioner was one of five or six Mexicans recruited on the DEA's behalf for that effort. Petitioner knew he was acting at the DEA's request and that the DEA would pay the expenses of the operation. The DEA explicitly instructed that respondent was not to be harmed in any way during his arrest and transport to the United States.

On the evening of April 2, 1990, petitioner and others entered respondent's office in Guadalajara, Mexico and took him into their custody. Respondent offered no resistance, and was not mistreated in any way. He was held at a private residence, and then at a motel, until midday on April 3, 1990, when he was taken by taxi to an airport. Respondent was flown in the company of petitioner and others to El Paso, Texas, where he was delivered to federal agents. Less than 24 hours elapsed between the time of his apprehension and his handover in El Paso. At no time during that detention was respondent abused, injured or otherwise harmed.

Respondent moved to dismiss the indictment brought against him by the grand jury in the Central District of California for lack of jurisdiction, citing violations of the extradition treaty between the United States and Mexico. Ultimately, this Court determined that respondent's arrest did not violate that treaty, and that the manner of his arrest did not deprive the trial court of jurisdiction. See *United States* v. *Alvarez-Machain*, 504 U.S. 655, 669-70 (1992). On remand,

the district court granted respondent's motion for a judgment of acquittal after the United States presented its case. That judgment was accordingly unreviewable.

2. Respondent returned to Mexico, and in 1993 filed this civil action. Relying upon a number of legal theories, he sought damages against both the United States and the DEA agents and Mexican nationals involved in his 1990 arrest and transportation to the United States. The United States was subsequently substituted for all the named individual defendants except petitioner, whom the district court ruled was not a DEA employee.

Respondent's claims against petitioner were advanced under, *inter alia*, the ATS. Following various proceedings and orders limiting respondent's claims against the several defendants, the district court entered summary judgment against petitioner with respect to (i) respondent's arrest and detention, and (ii) his transborder abduction. After a bench trial, the district court rejected respondent's remaining claims for assault and battery and intentional infliction of emotional distress as unsupported by the evidence, limited petitioner's liability for the detention and kidnapping claims to events in Mexico only, and awarded damages of $25,000 on those claims.

3. Petitioner appealed the judgment against him, and a panel of the court of appeals affirmed his liability on the ATS claims.[1] The Ninth Circuit then granted *en banc* review. On June 3, 2003, a deeply divided *en banc* court affirmed in part and reversed in part the judgment against petitioner.

---

[1] Respondent also appealed from the substitution of the United States for the DEA agents on his ATS claims; the dismissal of his claims under the Federal Tort Claims Act, 28 U.S.C. § 1346; and the limitation of his damages claim to harm suffered in Mexico. Although the appeals were consolidated in the appellate proceedings below, petitioner here focuses only on the court of appeals' decisions as they affect him.

The court first re-affirmed its prior conclusion, in *Hilao* v. *Estate of Marcos (In re Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467 (9th Cir. 1994), that the ATS provides not only jurisdiction but also a cause of action for tort suits alleging violations of international law. Pet. App. 10a. According to the court, moreover, such claims are not limited to alleged violations of *jus cogens* norms of international law—*i.e.*, those peremptory norms so broadly accepted that no derogation from them is permitted. *Id.* at 12a. Rather, the court held that a plaintiff need only allege violations of "'specific, universal and obligatory'" norms of customary international law. *Id.*

The court then held that, although state-sponsored transborder abduction does not violate international law, arbitrary arrest and detention does. Pet. App. 25a-26a. In deeming respondent's arrest arbitrary, the court concluded that the arrest was not "'"pursuant to law"'" because the warrant did not authorize execution outside the United States. *Id.* at 26a. Although the court acknowledged that federal law authorized DEA agents to effect warrantless arrests on probable cause for suspected felony violations, and that the criminal statutes respondent had been charged with violating applied extraterritorially, the court rejected the government's contention that DEA agents had authority to effect or direct a warrantless arrest in Mexico. The court also concluded that there was no requirement that a detention be prolonged in order to violate customary international law.

The *en banc* court's decision was met with two vigorous dissents. Judge O'Scannlain, writing for himself and three others, explained that "there is simply no basis in our nation's law for this bewildering result, and the implications for our national security are so ominous that I must dissent." Pet. App. 73a. He reasoned that liability could not be imposed under the ATS for violation of any norm to which the United States itself does not subscribe, and that the political branches have never assented to any norm prohibiting transborder

arrests. *Id.* at 80a-87a. "[B]y providing relief to Alvarez on his claim of prolonged arbitrary arrest, our court has in effect restricted the authority of our political branches . . . in a way that finds no basis in our law." *Id.* at 88a. In a separate dissent, Judge Gould objected that the case presented "a nonjusticiable political question requiring scrutiny of an executive branch foreign policy decision" to act against a foreign national on foreign soil, with adverse consequences for U.S. foreign relations. *Id.* at 97a.

SUMMARY OF ARGUMENT

I. By its plain terms, the ATS simply confers "original jurisdiction" on federal district courts to hear particular types of actions. It does not purport to create the civil actions to which it extends federal jurisdiction, nor does it contain any of the rights-creating language necessary to justify a finding that Congress intended to create a private right of action. *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). The placement of the ATS in Chapter 85 of the Judicial Code, which consists of a series of similar jurisdiction-vesting provisions, confirms that the statute simply authorizes federal courts to hear causes of action created elsewhere, and is not itself the source of any implied right of action. *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951).

The strictly jurisdictional nature of the ATS is confirmed by its original placement in Section 9 of the first Judiciary Act. That section consisted of a series of clauses granting the new district courts jurisdiction over particular "causes" or "suits." None of the clauses surrounding the ATS created any new "causes." Indeed, several necessarily assumed that such "causes" would have to be created under separate statutes, and the first Congress promptly created such "causes." There is no basis for concluding that the ATS, alone among the jurisdiction-vesting clauses of Section 9, impliedly created the very "cause of action" to which federal jurisdiction was extended.

Indeed, the history of the first Judiciary Act belies any such conclusion. The jurisdiction of the new federal courts was one of the burning political issues of the day and was debated extensively by members of Congress. Engaged in a divisive battle over the very existence of federal jurisdiction, these members plainly did not intend the basic jurisdictional grants of the first Judiciary Act implicitly to create a cause of action or to authorize federal courts to develop a body of tort remedies for violations of international legal norms.

II. There is also no basis for dispensing with the requirement of a cause of action for ATS suits. Contrary to the claims of some, the founding generation understood the concept of a "cause of action"—*i.e.*, the right to invoke the power of a court to obtain redress. In 1781, the Continental Congress urged the States to create precisely such a right for aliens injured by violations of the law of nations, and Connecticut responded by statutorily authorizing aliens to sue for damages. The first Congress likewise demonstrated its familiarity with the concept of a right to sue, by enacting a series of laws that expressly authorized the filing of various suits to recover damages or penalties. In doing so, it used language markedly different from that found in the ATS.

Nor is it true that the ATS merely extended jurisdiction to hear a category of torts that were already cognizable at common law. The 1781 Resolution and Connecticut statute would have been entirely unnecessary if torts that violate the law of nations were already actionable. In fact, tort law was still in its infancy in the eighteenth century, and it recognized only a handful of private wrongs, such as trespass and nuisance. The then-recognized violations of the law of nations were not torts at all, but public wrongs punished by the public itself through criminal prosecutions.

Finally, the ATS is not a grant of authority to fashion federal common law remedies for torts in violation of the law of nations. Proponents of the first Judiciary Act repeatedly yielded to the demands of those who feared a self-

aggrandizing new judiciary and insisted that it be given limited powers and jurisdiction. It is inconceivable that the authors of this Act would have conferred an unprecedented common law-making power on the federal courts to create causes of action that no state court had ever created. Such an extraordinary grant of power, moreover, was inconsistent with the founding generation's understanding of the role of judges, who did not "make" law at all, as well as with their understanding of the law of nations, which was not the source of independently enforceable rights.

In addition, this Court has made clear that the uniquely federal interest in foreign relations does not authorize plenary law-making by federal courts, but rather compels adoption of federal common law rules that ensure judicial deference to the political branches. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964). By granting Congress authority to define and punish offenses against the law of nations, the Constitution itself demonstrates that the decision to federalize international legal norms must be made by Congress, not the courts. And the first Congress confirmed the lack of judicial authority for such decisions, by declining to vest a "law of nations" lawmaking power in the courts, by modifying international legal norms before incorporating them into U.S. law, and by vesting responsibility for the enforcement of those modified norms with the Executive Branch.

III. The ATS must be read as a mere grant of jurisdiction to avoid the grave separation-of-powers concerns that a contrary interpretation creates. Judicial implication or creation of a cause of action under the ATS interferes with political branch management of foreign affairs, by creating friction and tensions with other nations, and by discouraging investments by U.S. companies in the very countries where the promise of such investment, or the threat of prohibiting it, can be an important diplomatic tool. It also interferes with the President's ability to protect the Nation, by exposing to tort liability foreign agents who help the federal government

apprehend criminals and terrorists on foreign soil. And, the very act of discerning which international legal norms should be binding in U.S. courts usurps the constitutional power and responsibility of the political branches to make such decisions. In the absence of the clearest evidence that Congress intended to authorize tort actions with such adverse effects—and there is none here—implication of a cause of action is constitutionally improper.

IV. If the Court upholds judicial implication or creation of a cause of action, such actions must be limited to suits for violations of international legal norms that the political branches have accepted. Such a limitation minimizes—but does not eliminate—the difficulties of defining a cause of action and the separation-of-power problems inherent in doing so. Here, the United States has never assented to an international legal norm barring extraterritorial arrest.

V. Finally, the Ninth Circuit's determination that respondent's brief detention violated customary international law is incorrect as a matter of law. Respondent's arrest was not arbitrary because Congress has authorized DEA agents to conduct extraterritorial arrests. In all events, separation-of-powers principles bar courts from finding violations of international legal norms where, as here, the political branches have affirmatively refused to accept those norms.

ARGUMENT

I. A CAUSE OF ACTION CANNOT BE IMPLIED UNDER THE ALIEN TORT STATUTE.

Plaintiffs seeking relief in federal court must establish both that their "legal rights have been invaded," and that "a cause of action is available," *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983)—*i.e.*, that "a federal statute provides for a general right to sue for such invasion." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); see also *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979) (a "cause of action"

entitles a litigant to "invoke the power of the court" in order "to enforce the right at issue"). The Ninth Circuit concluded that the ATS is not only a source of subject matter jurisdiction, "but also creates a cause of action for an alleged violation of the laws of nations." Pet. App. 10a. The latter conclusion is inconsistent with the language of the ATS, its placement in the Judicial Code, and this Court's standards for implying causes of action. It is also refuted by the original language and placement of the ATS in the first Judiciary Act, and by the history surrounding the adoption of that Act—all of which confirm that the ATS is a grant of jurisdiction from which a cause of action cannot be implied.

A. The Current Language And Statutory Context Of The Alien Tort Statute Make Clear That It Is Simply A Jurisdiction-Vesting Provision.

The ATS is nothing more than a jurisdiction-vesting provision. It states, in its entirety, that "[t]he district courts shall have original *jurisdiction* of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added). Thus, by its plain terms the ATS does nothing more than confer jurisdiction on federal courts to hear particular types of actions.

The ATS nowhere purports to *create* the civil actions to which it extends federal jurisdiction. Cf. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2, 106 Stat. 73, 73 (1992) ("Establishment of civil action" for certain types of violations of international law norms). Indeed, the ATS contains none of the "'rights-creating' language" necessary to justify the conclusion that Congress intended to create a private right of action for money damages. *Alexander* v. *Sandoval*, 532 U.S. at 288. The ATS does not, for example, identify or limit any particular defenses to a putative tort action. Cf. *Texas & Pac. Ry.* v. *Rigsby*, 241 U.S. 33, 40 (1916) (provision barring assumption of risk defense rendered "[t]he inference of a private right of action . . .

irresistible"). Nor does it authorize awards of attorneys fees to prevailing parties. Cf. *Cannon* v. *University of Chic.*, 441 U.S. 677, 699 (1979) (attorneys fee provision "explicitly presumes the availability of private suits to enforce" statutory rights). In fact, while the ATS grants jurisdiction over "any civil action," it does not refer to a civil action "brought to enforce any liability or duty *created*" by the Act—language that was necessary to imply a cause of action even when such remedies were more readily inferred. See *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964) (relying on the foregoing quoted language to imply private right). In light of this Court's repudiation of "*Borak*'s method for discerning . . . causes of action," *Alexander* v. *Sandoval*, 532 U.S. at 287, it is clear that a mere grant of "jurisdiction of any civil action by an alien for a tort" cannot support an implied cause of action.

The absence of any congressional intent to create such a remedy is confirmed by the ATS's current placement in Chapter 85 of the Judicial Code, which is entitled "District Courts; Jurisdiction." As its name suggests, Chapter 85 consists of a series of jurisdiction-vesting provisions that authorize the United States district courts to hear a wide range of issues. Like the ATS, many of these provisions confer jurisdiction over specific types of civil actions brought by particular individuals or entities. See, *e.g.*, 28 U.S.C. § 1345 ("district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States"); *id.* § 1347 ("district courts shall have original jurisdiction of any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants"). These provisions, however, do not provide the necessary cause of action for the designated claimants. See, *e.g.*, *United States* v. *California*, 655 F.2d 914, 918 (1980) (§ 1345 grants jurisdiction over suits brought by the United States "under any valid cause of action, state or federal").

In short, like the other provisions of Chapter 85 of the Judicial Code that "vest[] jurisdiction in the District Courts, [§ 1350] does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions." *Montana-Dakota Utils. Co.*, 341 U.S. at 249. Thus, if a U.S. treaty creates tort liability and authorizes aliens to recover damages for resulting injuries, § 1350 would confer jurisdiction on the district courts to hear such actions.[2] Similarly, if Congress were to create a cause of action for injuries sustained as a result of torts recognized under the law of nations, then § 1350 likewise would empower federal courts to entertain such claims. By its plain terms, however, § 1350 does not create any enforceable rights.

B. The Language And Placement Of The Alien Tort Statute In The Judiciary Act Of 1789 Confirm That It Is Strictly Jurisdictional.

The strictly jurisdictional nature of the ATS is confirmed by its original language and placement in the Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 76-77 (1789) (the "First Judiciary Act"). The ATS appeared in the First Judiciary Act as a single clause in Section 9, which set out the jurisdiction of the newly created federal district courts. Like the other clauses of Section 9, the ATS granted district courts jurisdiction to hear causes of action that Congress created elsewhere.

As originally enacted, the ATS gave district courts "*cognizance*, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." *Id.* § 9, 1 Stat. at 77, App. 1a-2a (emphasis added). The term "cognizance" was used by

[2] Although 28 U.S.C. § 1331 would also confer jurisdiction over such claims today, that was not true prior to 1875, when Congress passed the first statute creating "arising under" jurisdiction.

eighteenth century American lawyers as a synonym for "jurisdiction." Alexander Hamilton and James Wilson, a framer and later a Justice of this Court, used the terms interchangeably in their writings. See, *e.g.*, *The Federalist No. 81*, at 485-88 (A. Hamilton) (C. Rossiter ed., 1961); James Wilson, *Lectures on Law*, *in* 2 *The Works of James Wilson* 457 (R. McCloskey ed., 1967). And the terms were likewise used as synonyms by members of the House during debate on the Act itself.[3]

Significantly, the surrounding clauses of Section 9 were all purely jursidictional in nature. The first clause gave the new district courts exclusive "cognizance of all crimes and offences that shall be cognizable under the authority of the United States." First Judiciary Act, ch. 20, § 9, 1 Stat. at 76-77, App. 1a-2a. The second clause conferred "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." *Id.* The third clause conferred "exclusive original cognizance of all seizures on land" and on certain waters "made, and of all suits for penalties and forfeitures incurred, under the laws of the United States." *Id.* The fifth clause conferred concurrent "cognizance . . . of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars." *Id.* Finally, the sixth clause conferred "jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls." *Id.*

These surrounding clauses did not create the "causes" or "suits" to which jurisdiction was extended, nor did they authorize individuals to bring such "causes" or "suits." To the contrary, several necessarily contemplated that Congress

[3] *See, e.g.*, 1 Annals of Cong. 828 (J. Gales ed., 1789) (some "deem it expedient that [the district court] should be entrusted with a more enlarged *jurisdiction*; and should, in addition to admiralty causes, take *cognizance* of all causes of seizure on land, all breaches of impost laws, of offenses committed on the high seas, and causes in which foreigners . . . are parties") (emphasis added).

would create the "causes" elsewhere. The third clause, for example, conferred exclusive jurisdiction "of all *suits for penalties and forfeitures incurred, under the laws of the United States*." *Id.* (emphasis added). Both before and after passage of the first Judiciary Act, Congress enacted separate laws authorizing suits to recover penalties and forfeitures.[4] Cf. *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 415 (1865) (because the Judiciary Act was passed before there were any federal criminal statutes, the clause in § 11 of that Act "giving the Circuit Courts concurrent jurisdiction in all cases of crime cognizable in the District Courts, must, of necessity, have had reference to such statutes as should thereafter define offences to be punished in the District Courts").

The jurisdictional grants of Section 9, therefore, did not impliedly create causes of action, but instead authoritzed federal courts to hear those "causes" that Congress created elsewhere. Read in context, the fourth clause (*i.e.*, the ATS) must likewise be understood as a grant of jurisdiction that does not itself create any "causes" or authorize the filing of "suits." See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme'"). Indeed, there is no basis for assuming that the ATS, alone among the jurisdiction-granting

[4] *See, e.g.*, An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandise imported into the United States, ch. 5, § 29, 1 Stat. 29, 45 (1789) (providing that customs collectors who failed to post rates, fees and duties would forfeit $100 "to be recovered with costs, in any court having cognizance thereof, to the use of the informer"); An Act providing for the enumeration of the Inhabitants of the United States, ch. 2, § 3, 1 Stat. 101, 102 (1790) (providing for penalties for failure to file census returns, "which forfeitures shall be recoverable . . . by action of debt, information or indictment; the one half thereof to . . . the informer; [except] where the prosecution shall be first instituted on behalf of the United States").

clauses of Section 9, impliedly created the very cause of action to which federal jurisdiction was extended.

This understanding of the ATS is confirmed by the fact that, as of 1789, the United States had already entered into treaties that authorized aliens to sue for tort damages. For example, an "Indemnity" article in a 1778 treaty with France provided that:

> all the commanders of the ships of His Most Christian Majesty and of the said United States, and all their subjects and inhabitants, shall be forbid doing *any injury or damage* to the other side; and if they act to the contrary, they shall be punished, and shall moreover *be bound to make satisfaction for all matter of damage, and the interest thereof, by reparation*, under the pain and obligation of their person and goods.

Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr., art. XV, 1 Malloy 468, 474 (emphases added). Other treaties contained the same or similar language.[5] Thus aliens could sue U.S. citizens for damages and interest arising out of privateering-related injuries. The drafters of the ATS therefore had reason to understand that the jurisdiction they were creating would extend to treaty-based causes of action that the United States had already created elsewhere. That fact further undermines any claim that the drafters believed that the provision itself created such causes of action.

[5] *See, e.g.*, Treaty of Amity and Commerce, July 9, 1785, U.S.-Prussia, art. XV, 8 Bevans 78, 83 (persons "who shall molest or injure in any manner whatever the people, vessels, or effects of the other party, shall be responsible in their persons and property for damages and interest, sufficient security for which shall be given by all commanders of private armed vessels before they are commissioned").

C. The History Of The Judiciary Act Of 1789 Confirms That Congress Did Not Intend The Alien Tort Statute To Create A Cause Of Action.

The purely jurisdictional nature of the ATS is confirmed by the history of the Judiciary Act itself. The first Congress was undertaking the truly unprecedented task of creating a new federal judicial system that had to be "put into operation . . . before the new Government could function at all." Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 57 (1923). The jurisdiction of these new courts was not merely one of a number of details that the House and Senate had to iron out. The scope of federal jurisdiction was the central issue to be resolved in fashioning a federal judiciary—indeed, it was one of the burning political issues of the day. Grappling with fundamental and divisive questions concerning the very purpose and role of the federal judicial department under the new constitutional system, it is inconceivable that the first Congress even considered whether to create, let alone actually conferred, a new federal right of redress for aliens injured by torts that violated the law of nations or U.S. treaties.

Oliver Ellsworth is recognized as the principal author of the bill that a special Senate committee reported out after two months of work. *Id.* at 59-60. During the committee's work on the bill,

> a contest had been waged between those men who wanted to confine the Federal judicial power within narrow limits and leave to the State Courts the chief part of original jurisdiction, and those men who wished to vest the Federal Courts the full judicial power which the Constitution granted—namely, that it should "extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority."

Id. at 62 (quoting U.S. Const. art. III, § 2, cl. 1). The former faction prevailed, and language in early drafts that would have granted the federal courts cognizance over "'all cases of federal jurisdiction'" was deleted from the Bill as reported. *Id.*[6]

Not content with this victory, anti-federalists opened the debate in the full Senate in June 1789 by raising the fundamental issue "whether there should be any District Courts of the United States at all." *Id.* at 65. When, "[a]fter long debate," the Senate voted to establish such courts, the anti-federalists immediately moved to limit the jurisdiction of both district and circuit courts to admiralty or maritime causes. *Id.* at 66-67. As Professor Warren explained, "[t]his was the crucial contest in the enactment of the Judiciary Act." *Id.* at 67. Although the anti-federalists lost, *id.* at 68, this was not the last time they would contest the issue.

Having beaten back this drastic limitation, the federalists obtained a few modest expansions of the district courts' jurisdiction. The Senate granted district courts exclusive jurisdiction over suits against consuls, or vice-consuls (except for certain criminal offenses) and added what became the third clause of § 9, which conferred exclusive jurisdiction for "'all seizures on land'" and on certain waters, "'made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.'" *Id.* at 74-75. No changes, however, were made in the clause that became the ATS.

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[6] There are no records of the debates in the Senate Committee or the Senate itself. Later historians have noted that Professor Warren based his account of the amendments that the full Senate made to the committee bill by comparing the final Senate version to the committee's handwritten version, rather than to the "slightly different" printed committee bill that the Senate actually used in the debates. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 496 n.158 (1986). Petitioner has not relied on any portion of Warren's recitation of events that might have been affected by his mistaken comparison.

In addition to modifying the jurisdiction of the circuit courts and this Court, *id.* at 78-80, 93-94, the Senate engaged in a heated debate over whether federal courts should possess any equity jurisdiction. *Id.* at 96-100. This debate reflected, in part, a strong reluctance to give federal courts powers that state courts lacked. *Id.* at 96. The issue was resolved by limiting federal equity powers to those that "then existed" at common law. *Id.* at 97.

These fights over federal court jurisdiction were not arcane matters of concern only to lawyers and judges. To the contrary, the initial Senate bill "was widely reported in the newspapers," and "the people at large were keenly following" its progress. *Id.* at 63-64. Indeed, newspaper editors expressed passionate views on such seemingly minor issues as the bill's failure to include assignments of real estate in a provision that prevented parties from creating circuit court diversity jurisdiction through assignments of "choses in action." *Id.* at 80 n.73 (citing *Centinel Revived*, Indep. Gazetteer (Phil.), Aug. 27 & Sept. 9, 1789).

After the Senate passed the bill, the House postponed debate on it in order to consider the proposed amendments to the Constitution, many of which also related to the judiciary. *Id.* at 111. Anti-federalists in the House twice moved, unsuccesfully, for consideration of a constitutional amendment that would have confined lower federal courts to admiralty jurisdiction. *Id.* at 119-20. When the House finally took up the Judiciary bill, the anti-federalists opened the debate by again seeking to restrict the lower federal courts to admiralty jurisdiction. See 1 Annals of Cong. 813 (J. Gales ed., 1789). That motion was debated extensively for two days before it was defeated. *Id.* at 826-66.

During this debate, Members not only referred to the district court's "jurisdiction" or "cognizance" countless times, they also distinguished between statutes that grant jurisdiction and those that create new "causes." In a speech that was reprinted in the newspapers, Fisher Ames asked rhetorically

"who shall try a crime against the law of the United States, *or a new created action*." *Id.* at 838 (emphasis added).[7] He then gave, as an example of such a "new created action," an "action . . . *brought on a statute*, declaring a forfeiture equal to the whole of the goods against him whoever shall unlade without a permit," *id.* at 839 (emphasis added)—precisely the type of statutory cause of action contemplated by the third clause of Section 9. See *supra* at 14. Representative Vining likewise justified the necessity of federal courts by referring to the new causes of action that Congress would create: "from your amazingly increasing system of Government," he argued, "causes must necessarily multiply in a proportionably extensive ratio; these causes must be tried somewhere." 1 Annals of Cong. at 853. No one, however, referred to the ATS as one of the "new created action[s]" that the district courts had jurisdiction to decide.

Finally, during Senate debate on the House-passed constitutional amendments, the anti-federalists in the Senate made one last run at their cherished goal of a federal judiciary confined to admiralty cases. They moved for an amendment limiting federal court jurisdiction to such cases. Warren, *supra*, at 127. Once again, they lost. *Id.*

In sum, the jurisdiction of the district courts was one of the most hotly contested political issues of the day. It was debated repeatedly and extensively by Senators and Representatives who understood the difference between jurisdiction and the causes of action to which federal jurisdiction could extend. It is clear that the contestants in this struggle over fundamental first principles were concerned with the first principles themselves—the existence and scope of the *jurisdiction of the new federal courts*—and were not concerned with creating any of the "causes" to which that jurisdiction would extend. Indeed, as discussed in greater

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[7] In a letter, Ames identified this speech as one reprinted in the newspapers. *See* Warren, *supra*, at 123 n.166.

detail below, they soon turned their attention to that subject, and used markedly different language than that found in the ATS to create these new "causes." See *infra* at 23.

Read in its historical context, the fourth clause of Section 9 of the first Judiciary Act, like the clauses surrounding it, can only be understood as a grant of jurisdiction to hear "causes" created elsewhere. As one scholar has concluded, the ATS "is purely jurisdictional, and the first Congress undoubtedly understood this to be the case. . . . Any suggestion that the statute creates a federal statutory cause of action is simply frivolous." Casto, *supra*, at 479-80 (footnote omitted).

II. AN ACTION FOR A TORT IN VIOLATION OF THE LAW OF NATIONS CANNOT BE BROUGHT IN THE ABSENCE OF A CAUSE OF ACTION.

In the face of this evidence, proponents of ATS claims have attempted to dispense with the requirement of a cause of action altogether. They argue that the concept of a cause of action was not invented until 1848, and that it is therefore "antihistorical" to require evidence of a congressional intent to confer one. See William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 Hastings Int'l & Comp. L. Rev. 221, 237-39 (1996). Second, they claim that the first Congress simply provided federal jurisdiction to hear "a category of tort actions—those that violated the law of nations or a treaty of the United States—that were already cognizable at common law." *Id.* at 237. Third, they claim that the ATS empowers federal judges to implement the law of nations by fashioning appropriate domestic federal common law remedies. Casto, *supra*, at 480. All of these claims are wrong.

A. The First Congress Was Familiar With The Requirement Of A Cause Of Action.

Proponents of ATS claims have argued that the concept of a "cause of action" did not exist until 1848, when New York abolished the distinction between law and equity and required

complaints to include "'"[a] statement of the facts constituting the cause of action."'" Dodge, *supra*, at 239 (alteration in original) (quoting *Passman*, 442 U.S. at 237). From this, they reason that any requirement that aliens demonstrate that they possess a cause of action to bring an ATS claim is "patently antihistorical." *Id.* at 237. In fact, this claim is itself historically mistaken.

The first Congress plainly understood the concept of authorizing suits to enforce rights. As this Court has explained, the phrase "cause of action" can refer *either* to "the alleged invasion of recognized legal rights upon which a litigant bases his claim for relief," *Passman*, 442 U.S. at 237 (internal quotation marks omitted)—terminology first introduced in 1848, *id.*—*or* to the distinct concept of an authorization to "invoke the power of the court" to "enforce the right at issue." *Id.* at 240 n.18. The founding generation of American lawyers plainly understood the latter concept, and had in fact grappled with it in connection with torts in violation of the law of nations.

At least as early as 1781, the Continental Congress was concerned with the lack of availability of redress for violations of the law of nations. In that year, a committee of Congress reported that "the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations," and that foreign powers could refuse to accept U.S. disavowals of transgressions of that law by a U.S. citizen "if regular and adequate punishment shall not have been provided against the transgressor." 21 Journals of the Continental Congress 1774-1789, at 1136 (G. Hunt ed., 1912) (1781) ("Journals"). Because such transgressions could, if unpunished, provide an excuse for war, the Continental Congress adopted a resolution in 1781 calling on the state legislatures "to provide expeditious, exemplary and adequate punishment" for "violation of safe conducts or passports," "the commission of acts of hostility against such as are in amity, league or truce with the United States,"

"infractions of the immunities of ambassadors and other public ministers," and "infractions of treaties and conventions to which the United States are a party." *Id.* at 1136-37, App. 3a.[8] Significantly, the 1781 Resolution went on to recommend that the state legislatures "*authorise suits to be instituted for damages* by the party injured." *Id.* at 1137, App. 4a (emphasis added).

The only State that appears to have responded to this call, see Dodge, *supra*, at 228-29, was Connecticut. In addition to criminalizing certain conduct, Connecticut adopted a broad tort remedy for aliens (among others) that provided that:

> if any Injury shall be offered and done by any Person or Persons whatsoever, to any foreign Power, or to the Subjects thereof, either in their Persons or Property, by Means whereof any Damage shall or may in any Wise arise, happen or accrue, either to any such foreign Power, to the said United States, to this State, or to any particular Person; the Person or Persons offering or doing any such Injury, *shall be liable to pay and answer all such Damages* as shall be occasioned thereby.

Acts and Laws of the State of Connecticut, in America 83 (1784), App. 6a (emphasis added).

Thus, both the 1781 Resolution and the Connecticut statute flatly refute any claim that the founding generation "would have [been] mystified" by the concept of an authorization to sue to enforce rights. Dodge, *supra*, at 239. Indeed, these two measures reflect a clear appreciation for the necessity of an authorization to seek redress for torts that violated the law of nations. Moreover, Oliver Ellsworth, the principal author of the Judiciary Act of 1789, was a member of the Continental Congress that passed the 1781 Resolution, and

[8] These infractions tracked Blackstone's list of the "principal offences against the law of nations . . . : 1. Violations of safe-conducts; 2. Infringement of the rights of embassadors; and, 3. Piracy." 4 William Blackstone, *Commentaries* *68.

the Connecticut General Assembly that responded expressly by authorizing tort claims brought by aliens, *id.* at 228-29, and Ellsworth had served as a judge of the Connecticut Superior Court. Julius Goebel, Jr., *History of the Supreme Court: Antecedents and Beginning to 1801*, at 459 (1971).

The first Congress also demonstrated that it understood the difference between the jurisdiction of courts to hear cases, and the authorization necessary for individuals to bring suits. Fisher Ames' example, during the debate on the Judiciary Act, of "an action . . . *brought on a statute*" to recover a statutory forfeiture, 1 Annals of Cong. at 839 (emphasis added), closely tracked language that the first Congress often used to authorize individuals to enforce rights under federal statutes. Thus, for example, An Act for the Encouragement of Learning created a remedy for copyright damages "to be recovered by a *special action on the case founded upon this act*, in any court having cognizance thereof." Ch. 15, § 6, 1 Stat. 124, 125-26 (1790) (emphasis added). This same act provided for forfeitures against copyright infringers, and authorized authors to "sue for the same, and the other moiety thereof to and for the use of the United States, to be recovered by action of debt." *Id.* § 2, 1 Stat. at 125. Similarly, the first patent act provided that infringers "shall forfeit and pay to the said patentee . . . such damages as shall be assessed by a jury . . . which may be recovered in an *action on the case founded on this act*." An Act to Promote the Progress of Useful Arts, ch. 7, § 4, 1 Stat. 109, 111 (1790) (emphasis added). And a merchant marine act provided that seaman who jumped ship "shall be liable to pay [the master] all damages . . . and such damages shall be recovered with costs, in any court . . . having jurisdiction of the recovery of debts." An Act for the Government and Regulation of Seaman in the Merchants Service, ch. 29, § 5, 1 Stat. 131, 133 (1790). Numerous other statutes passed by the first Congress authorized "informers" to sue to recover a portion of statutory penalties. See note 4, *supra*.

There is thus ample evidence that the drafters of the ATS understood the concept of a cause of action, and the difference between that concept and the concept of jurisdiction. In drafting the jurisdictional provisions of the Judiciary Act, including the ATS, they did not intend to create new "causes." Rather, they anticipated that other statutes would authorize suits to enforce various rights, and they in fact adopted numerous such statutes themselves.

B. Torts "In Violation Of The Law Of Nations" Were Not Cognizable At Common Law In 1789.

Alternatively, proponents of ATS claims contend that the first Congress did not need to create a cause of action for torts in violation of the law of nations or U.S. treaties because such torts were "already cognizable at common law." Dodge, *supra*, at 237. It is this claim—and not the requirement of a cause of action—that is "patently antihistorical." There were no recognized torts "in violation of the law of nations" at the end of the eighteenth century, which is why the Continental Congress repeatedly urged the States to create such causes.

Although it is natural to read the term "tort" in the ATS in light of modern legal meanings and practice, it is mistake to do so. "The lack of a recognizable system of tort is one of the major differences between liability law before 1800 and after about 1850." Kermit L. Hall et al., *American Legal History* 178 (1991). "Not a single treatise on the law of torts was published before 1850," Lawrence M. Friedman, *A History of American Law* 299 (2d ed. 1985), and "[t]he term 'tort' appears only once in the index of Blackstone's *Commentaries on the Laws of England*." Hall, *supra*, at 178. Blackstone devoted little attention to torts "because the substance of the common law of wrongs *was almost nonexistent before the mid-nineteenth century*." *Id.* (emphasis added). See also Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 835 (1989) (in the 1780s, "the judicial enforcement of rights was confined to

claims fitting under common-law categories dealing with property and contract").

To the extent it did exist, tort law in the 1780s did not include cognizable actions for violations of the law of nations or treaties. Blackstone lists only actions for "trespasses, nuisances, assaults, defamatory words, and the like," as recognized tort actions. 3 William Blackstone, *Commentaries* *117. In his brief discussion of torts, he nowhere mentions violations of safe-conducts, infringement of the privileges of ambassadors, or piracy—all of which he grouped under the entirely separate heading of "Offences against the Law of Nations." 4 Blackstone, *supra*, at *68; see also Casto, *supra*, at 491 (acknowledging that Blackstone did not treat violations of the law of nations as "being a civil tort"). Unlike torts, which were "private wrongs," "offences" against the law of nations were public wrongs, which could justify the initiation of war by the injured state, unless the government of the transgressors "animadvert[ed] upon them with a becoming severity, that the peace of the world may be maintained." 4 Blackstone, *supra*, at *68; see also *id.* at *67 (explaining that England "animadverted on" such wrongs through its "municipal" criminal laws).

Thus, violations of the law of nations were not private wrongs redressable through private tort actions, but public wrongs, to be punished by the public itself to avoid the public calamity of war. The common law of the 1780s did not authorize individuals injured by such public wrongs to invoke the power of the courts to obtain redress for such injuries, which is precisely why the Continental Congress passed a resolution urging the States to enact statutes authorizing such suits. Indeed, if torts in violation of the law of nations were already cognizable at common law, there would have been no need for Congress to have passed its 1781 Resolution.

The necessity of such authorization is confirmed by the two incidents that most scholars identify as the impetus behind the ATS. The first occurred in Philadelphia in 1784, when a

French citizen, de Longchamps, threatened and then assaulted the French Consul General, Marbois. Casto, *supra*, at 491-92. After the French and other foreign representatives protested, Congress offered a reward for de Longchamps' capture, but was otherwise powerless to act. *Id.* Congress once again passed a resolution "strongly recommend[ing] to the legislatures of the respective States to pass laws for the exemplary punishment of such persons," 28 Journals, at 315 (J. Fitzpatrick ed., 1933) (1785), and asked John Jay to draft appropriate legislation, 29 Journals, at 655. Although it was at great pains to assure France of this country's respect for the law of nations, 28 Journals, at 314-15, Congress nowhere suggested that any form of civil redress was available through the state courts. Nor is there any record that Marbois ever filed a civil action. Dodge, *supra*, at 230. Similarly, there is no record of any civil action being instituted by the Dutch Ambassador when, four years later, a New York City constable entered his house and arrested one his servants. *Id.* Rather, in both cases, the law of nations was vindicated through criminal, *i.e.*, public, prosecutions of these public offenses. Casto, *supra*, at 494.

In short, as the 1781 Resolution makes clear, there were no cognizable common law tort actions for violations of the law of nations in the 1780s. Thus, unlike the grant of diversity jurisdiction, the ATS cannot be understood as extending federal jurisdiction to well-known common law causes of action that authorized private individuals to invoke the remedial powers of the courts. Rather, the ATS conferred federal jurisdiction over a species of actions that required additional legislative acts (*i.e.*, statutes or treaty ratifications) authorizing individuals to seek redress in the courts.

C. The Alien Tort Statute Does Not Authorize Creation Of A Federal Common Law Remedy For Torts In Violation Of The Law Of Nations.

Finally, ATS proponents have argued that the Act's grant of jurisdiction is, in effect, a grant of authority to federal courts

to exercise their power to make federal common law to provide remedies for torts in violation of the law of nations. Quoting this Court's statement in *The Paquete Habana*, 175 U.S. 677, 700 (1900), that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction," the Second Circuit construed the ATS as authorizing federal courts to provide redress for "rights already recognized by international law." *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). See also Casto, *supra*, at 480 (ATS creates "a federal forum in which federal judges are given power to implement the law of nations by fashioning appropriate domestic federal remedies"). This theory suffers from a number of fatal flaws.

1. Construing the Alien Tort Statute as an Authorization to Create Federal Common Law Is Inconsistent With the Intent and Understandings of the Enacting Congress.

As petitioner has shown, the first Congress simply intended the ATS to vest jurisdiction in the federal courts. That intent alone precludes a finding that the ATS can serve as a grant of federal common law-making power: "The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). Nor is this the only evidence that the first Congress did not intend the ATS to serve as a font of judicial law-making power.

First, as petititoner has shown, the first Congress plainly understood the concept of a cause of action, and the principal author of the ATS, Oliver Ellsworth, knew that there was no recognized authorization to sue for torts in violation of the law of nations. Under these circumstances, it is inconceivable that the drafters of the ATS intended—without uttering a single word on the subject—to confer a common law-making power on the new federal courts to create causes of action that no state courts had created. An intent to confer such an

unprecedented judicial law-making power is rendered particularly implausible in view of the fact that, within months of enacting the Judiciary Act, the first Congress employed its Article I powers to create a number of express causes of action. See *supra* at 23.

Second, and perhaps even more telling, the proponents of the first Judiciary Act repeatedly sought to placate the concerns of anti-federalists, who feared an oppressive and self-aggrandizing federal judiciary. The Act was thus "a compromise measure, so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given *the minimum powers* and jurisdiction." Warren, *supra*, at 53 (emphasis added). Indeed, in the case of equity jurisdiction, the Senate flatly refused to give federal courts broader powers than state courts had ever exercised. See *supra* at 18. It is simply inconceivable, therefore, that the first Congress would have sought to confer an unprecedented law-making power on the federal courts—let alone that they would grant a power to make *federal* common law in a provision conferring concurrent jurisdiction on *state* courts. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938) (diversity statute does not authorize creation of federal common law).

Deriving an authorization to create federal common law from the ATS is also inconsistent with basic assumptions the founding generation had about the role of judges. Eighteenth century judges were not understood to "make" common law within the meaning of *Erie*. Instead, they "found" or "discovered" a general common law that was thought to have an independent existence as part of natural law. See generally Morton J. Horwitz, *The Transformation of American Law, 1780-1860*, at 7 (1977). It is thus anachronistic to suppose that the first Congress could have viewed the ATS as a post-*Erie*-style grant of authority to create federal common law remedies for torts in violation of the law of nations.

In addition, as petitioner has shown, the "law of nations" was not the source of any *enforceable* tort remedies in 1789. Even today, international law does not "create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws," *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring); see also *United States* v. *Diekelman*, 92 U.S. (2 Otto.) 520, 524 (1875) (an individual injured by foreign conduct "must seek redress through his own government," which may prosecute the claim "as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war"). To the extent the law of nations was "part of our law," therefore, it served as a body of rules to which courts resorted to resolve *otherwise authorized actions*. See *The Paquete Habana*, 175 U.S. at 700 (international law "must be ascertained and administered by the courts . . . as often as questions of right depending upon it *are duly presented* for their determination") (emphasis added); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 422-23 (1964) (international law "establishes substantive principles for determining whether one country has wronged another" and is applied "as a part of our own *in appropriate circumstances*") (emphasis added).[9] While members of the first Congress

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[9] "Questions of right" that depended upon the "law of nations" were most often "duly presented" in maritime actions. *See Federalist No. 80*, at 478 (Alexander Hamilton). Despite being categorized as a branch of the "law of nations," however, admiralty law was understood by "sophisticated eighteenth century lawyers," as it is today, to be a form of domestic law. *See* Casto, *supra*, at 475 n.45; *see also* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 1-5, at 15 (3d ed. 2001) ("maritime law . . . became English national law" during the eighteenth century). Well before the 1780s, moreover, there were a host of recognized maritime causes of action. *See id.* Thus, members of the first Congress would not have understood the "law of nations" to *create*

might have expected these rules to evolve over time, they would not have understood the statute to empower federal judges to enforce "rights" derived from rules that did not then—and still do not today—give rise to enforceable rights.

Finally, treating the ATS as a grant of federal common law-making power results in a jurisdictional anomaly that the enacting Congress could never have intended. Some have argued that, where a plaintiff states a claim for a tort in violation of the law of nations, federal jurisdiction is available under § 1331, because the plaintiff's action "'arises under' § 1350 and, therefore, under a law of the United States, as required by § 1331." *Tel-Oren*, 726 F.2d at 779 n.4 (Edwards, J., concurring). But the ATS is indisputably a grant of jurisdiction. Such an "arising under" theory implausibly strips the ATA of its clear jurisdictional role and treats it as a mere predicate for federal question jurisdiction that Congress did not create until nearly a century later.

2. The Founding Generation's Desire to Ensure Adherence to the Law of Nations Does Not Render the Alien Tort Statute a Source of Federal Common Law-Making Power.

Although the first Congress clearly did not intend the ATS to serve as a source of judicial common law-making power, this Court has indicated that federal courts may formulate federal common law in the absence of congressional intent where "'necessary to protect uniquely federal interests,'" such as "our relations with foreign nations." *Texas Indus., Inc.*, 451 U.S. at 640-41 (quoting *Sabbatino*, 376 U.S. at 426). *Sabbatino* itself, however, held that the uniquely federal interests that arise in disputes implicating foreign relations justify a federal common law rule of judicial *restraint and deference to the political branches*. The founding generation's concern with ensuring national adherence to the

maritime causes of action, but rather to serve as a body of domestic rules for resolving such actions.

law of nations confirms that decisions about when international norms should be enforceable in U.S. courts should be left to the national political branches.

In *Sabbatino*, this Court ruled that, as a matter of federal common law, the act of state doctrine bars federal and state courts from examining the validity of a taking of property by a foreign government within its own territory, "even if the complaint alleges that the taking violates customary international law." 376 U.S. at 428. In adopting this rule, the Court cited the separation-of-powers underpinnings of the doctrine, and repeatedly stressed the constitutional responsibility, and far greater competence, of the political branches in the field of foreign affairs.[10] Thus, "*Sabbatino*'s federal common law analysis was designed to shield courts from involvement in foreign affairs. It was not an endorsement of a free-wheeling coordinate lawmaking power for federal courts in the foreign affairs field." Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 861 (1997) (footnote omitted).

Although there are numerous statements from the constitutional convention and ratification debates in which proponents of the new constitution stressed the need for federal court *jurisdiction* over cases involving the law of nations, the founding generation's desire to ensure national conformity with the law of nations confirms that the ATS is not a source of "a free-wheeling coordinate law-making power for federal courts." *Id.* The Framers empowered Congress, not the courts, to "define and punish Piracies and Felonies committed on the high Seas, and Offences against

[10] *See, e.g., Sabbatino*, 376 U.S. at 423 (act of state doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals"); *id.* at 427-28 (the doctrine reflects "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs").

the Law of Nations." U.S. Const. art. I, § 8, cl. 10. This provision "strongly implies that the choice to federalize or not federalize is left to Congress—not the federal courts." Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 Va. J. Int'l L. 365, 431 (2002).

That implication hardens into conviction in light of the actions of the first Congress. As noted above, the first Congress did not grant federal courts exclusive jurisdiction over claims falling within the ATS's jurisdictional grant. Nor did it adopt the 1781 Resolution's proposal "to erect a tribunal in each State, or to vest one already existing with power to decide on offenses against the law of nations, not contained in the [Resolution's] enumeration [of such offenses]." 21 Journals at 1137, App. 4a. Instead, the first Congress exercised its power under the Define and Punish Clause to "animadvert on" the three then-recognized offenses against the law of nations. An Act for the Punishment of certain Crimes against the United States, ch. 9, §§ 8-9, 25-28, 1 Stat. 112, 113-14, 117-18 (1790) ("First Crimes Act"). In doing so, moreover, it created an exception to the immunities of ambassadors, which, in England, nullified all legal process against an ambassador or "his domestic or domestic servant[s]." 4 Blackstone, *supra*, at *70. The first Congress, by contrast, provided that the immunity of any "domestic or domestic servant" of an ambassador did not extend to any "citizen or inhabitant of the United States, who shall have contracted debts prior to his entering into the service of any ambassador or other public minister, which debts shall be still due and unpaid." First Crimes Act, ch. 9, § 27, 1 Stat. at 118.

Through its actions, therefore, the first Congress asserted political branch primacy over the law of nations. It declined to vest a "law of nations" lawmaking power in the courts (as the Continental Congress had proposed) or even to grant federal courts exclusive jurisdiction over cases involving the law of nations. It expressly incorporated international norms into U.S. law, but only after *modifying* those norms. And it

vested responsibility for enforcing those modified norms in the executive branch.

Moreover, as one scholar has explained, "a sizeable portion of early pronouncements about the application of the law of nations to American law must be understood as having been advanced to augment *the executive's* assertion of power over foreign affairs." Jay, *supra*, at 844 (emphasis added). Most notably, in the decade following passage of the Judiciary Act, members of the Washington Administration, aided by a number of federalist judges, argued that the law of nations provided the basis (in the absence of any statute) for prosecuting violations of the neutrality treaty with Britain—a legal position that "significantly augumented executive power."[11] *Id.* at 846. Indeed, "[f]rom the very first years of the country, the law of nations often has served more as a source of executive power." *Id.* at 848.

In short, the early actions of Congress and the executive branch confirm that it is the political branches that have primacy with respect to the law of nations. In light of that history, the ATS cannot plausibly be understood as a source of an affirmative *judicial* law-making power. Rather, consistent with *Sabbatino*'s teachings, this early history demonstrates that the federal courts should leave to the political departments—and, in particular, to Congress—decisions about whether and under what circumstances aliens can invoke the power of federal courts to seek redress for torts that violate international norms. As petitioner demonstrates next, any judicial arrogation of that power raises serious separation-of-powers concerns.

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[11] This Court ended this practice in *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812).

III. IMPLYING OR CREATING A CAUSE OF ACTION UNDER THE ALIEN TORT STATUTE RAISES GRAVE SEPARATION-OF-POWER CONCERNS.

If there were any doubt about the impropriety of implying or creating a cause of action under the ATS, those doubts must be resolved in favor of a purely jurisdictional reading of the ATS in order to avoid the serious separation-of-powers problems that a contrary interpretation creates. First, judicial implication or creation of a cause of action interferes with the political branches' conduct of foreign affairs. Second, as this case illustrates, a judicially implied or created cause of action interferes with political branch efforts to promote and protect the Nation's security. Finally, in attempting to give content to a judicially implied cause of action, lower courts have usurped the power and responsibility of the political branches to decide which norms of international law should be binding.

A. Judicial Implication Or Creation Of A Cause Of Action Interferes With The Conduct Of Foreign Affairs By The Political Branches.

"The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—Departments." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). See also *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2386 (2003). Judicial implication or creation of a cause of action under the ATS can cause—and in fact has caused—international frictions and tensions that complicate and interfere with political branch management of U.S. foreign relations. In the absence of evidence that Congress intended to authorize judicial actions with such untoward consequences—and there is none here—judicial implication of a cause of action under the ATS is inconsistent with the Constitution's allocation of responsibility for management of the Nation's foreign affairs.

In two recent ATS cases, senior officials of foreign governments expressed concern and even anger about the very existence of the suits. See, *e.g.*, Letter from Soemadi D.M. Brotodiningrat, Ambassador of Indonesia to the United States, to Richard Armitage, Deputy Secretary, U.S. Department of State (July 15, 2002), *filed in Doe I* v. *ExxonMobil Corp.*, No. 01cv1357 (D.D.C. document filed Aug. 1, 2002); South African President Thabo Mbeki, Statement to the National Houses of Parliament and the Nation (Apr. 15, 2003), *available at* http://www.anc.org.za/ancdocs/history/mbeki/2003/tm0415.html. Indeed, the President of South Africa stated that his nation considered it "completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation." *Id.*[12] These reactions, in turn, complicate diplomatic efforts, forcing the Executive Branch to promote foreign policy goals by opposing such lawsuits and thereby face the wrath of public opinion, or to stay silent and damage our Nation's position with foreign nations. Cf. *Sabbatino*, 376 U.S. at 436 (executive branch will often "wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically").

Indeed, in some instances such suits can affirmatively impair pursuit of U.S. foreign policy goals. The State Department's Legal Adviser advised a court that adjudication

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[12] These cases are not aberrational in this regard. Many ATS suits are likely to upset foreign governments. *See* Tom Carter, *Outside Investors Face "Slave Labor" Suit*, Wash. Times, Apr. 9, 2001 (noting plans to sue the Cuban government for constructing a system of "slave labor"); *Bao Ge* v. *Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000) (dismissing lawsuits over China's alleged slave labor), *aff'd*, 35 Fed. Appx. 1 (D.C. Cir. 2002) (unpublished per curiam decision).

of one ATS case would "risk a potentially serious adverse impact on significant interests of the United States." Letter of William H. Taft, IV, Legal Adviser, Department of State, to Hon. Louis F. Oberdorfer 1 (July 29, 2002) *filed in Doe I* v. *ExxonMobil Corp.*, No. 01cv1357 (D.D.C. document filed Aug. 1, 2002). Explaining that "the government and people of Indonesia react most negatively to any perceived intrusion into areas of Indonesian sovereignty," the Legal Adviser opined that adjudication of the suit "could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform." *Id.* at 2-3.

ATS litigation can also undermine the ability of the political branches to use economic leverage to advance foreign policy goals. The President can use the ability to permit or prohibit U.S. investment abroad to induce cooperation from repressive or hostile regimes. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 375-76 (2000). Recently, however, plaintiffs have begun to use the ATS to seek to hold multinational corporations liable for state-sponsored human rights abuses that occur in countries where those corporations operate. See, *e.g.*, *Ntsebeza* v. *Citigroup Inc.*, 1:02cv4712 (S.D.N.Y. filed June 19, 2002) (claims against corporations doing business in South Africa during apartheid era). U.S. businesses operating overseas thus face new, and undefined liability based on evolving norms of international law—liability risks that can chill or curtail U.S. investment in the very countries where the promise of such investment, or the threat of prohibiting it, can be a powerful diplomatic tool. See generally Brief for the National Foreign Trade Council, et al., as *Amici Curiae* in Support of Petitioner at 5-19.

In *Sabbatino*, this Court concluded that the risk that judicial decisions could be perceived as an "affront to another state," or could "seriously interfere with" diplomatic efforts, including "economic and political sanctions," 376 U.S. at

431-32, justified a refusal to adjudicate recognized state law causes of action. These same concerns mandate adoption of a strong presumption that courts should not imply (or create) a cause of action that can complicate or interfere with the conduct of U.S. foreign policy absent the clearest evidence that Congress intended to authorize such actions. Indeed, such a presumption is a natural corollary to the "long-standing" presumption against extra-territorial application of federal law, *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), *superseded by statute on other grounds*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994)—a presumption that prevents "unintended clashes between our laws and those of other nations which could result in international discord." *Id.*

It is clear that the first Congress never intended to authorize tort actions with the potential for such adverse effects on the conduct of U.S. foreign policy. It is inconceivable, for example, that the first Congress ever envisioned U.S. state and federal courts passing factual, moral and legal judgments on events that occurred within the borders of another nation (as in this case), or that involved exercises of foreign governmental authority (as in *Bao Ge* v. *Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000)). The impetus for the ATS was incidents that occurred on U.S. soil. See *supra* at 25-26. More fundamentally, when the ATS was passed, America was "a weak power with an unproven government, operating in a world in which warfare was a common form of dispute resolution and a principal element of the international aspirations motivating many nations." Jay, *supra*, at 821. The founding generation repeatedly sought to *avoid* offending other countries—by urging States to punish violations of the law of nations, apologizing for the inability of the Continental Congress to do so, criminalizing such violations shortly after ratification of the Constitution, and invoking the law of nations to punish neutrality violations in the 1790s.[13] In light

[13] This desire to placate other nations also explains a 1795 Attorney General opinion that suggested that British citizens injured by U.S.

this history, there can be no doubt that the first Congress did not intend to authorize tort actions that would *cause* complaints and expressions of outrage from ambassadors and presidents of foreign nations. Judicial implication of a cause of action is thus constitutionally improper.

B. Judicial Implication Or Creation Of A Cause Of Action Interferes With The Executive's Efforts To Protect National Security.

As this case makes clear, judicial implication or creation of a cause of action under the ATS can also interfere with national security efforts. In the absence of a clear congressional intent to authorize actions that can cause such interference—and there is none here—judicial implication of such a cause of action is constitutionally improper.

The United States has explained that imposing liability on aliens who assist the federal government in its efforts to apprehend indicted murderers and other criminals on foreign soil inescapably impairs the government's anti-terrorism efforts. See Brief for the United States as *Amicus Curiae* at 3, 22, *John Doe I* v. *Unocal Corp.*, Nos. 00-56603, 00-56628 (9th Cir. filed May 8, 2003) (*en banc*), Pet. App. 228a-229a, 242a-243a (citing panel decision below). The assistance of foreign agents operating on foreign soil is vital to the Nation's efforts to fight both international terrorism and international

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participants in a French raid on a British colony "have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations." 1 Op. Att'y Gen. 57, 59 (1795). At a time when the Washington Administration was stretching the common law past the breaking point to prosecute conduct that did not violate federal law (but could be deemed a breach of neutrality by Britain), *see United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812), it is not surprising that the Attorney General would overstate the ATS's scope. *See* Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 Am. J. Int'l L. 62, 67 (1988) (noting "[t]he imperative security interests"—*i.e.*, avoiding war with Britain and France—"that animated . . . Attorney General Bradford['s]" opinion).

crime. For example, the United States might request that a Middle East ally detain a suspected terrorist for questioning. Under the decision below, however, the U.S. officials who convey the request, the foreign officials who execute it, and any cooperating individuals who participate in a brief detention, expose themselves to the burdens of defending their actions in distant U.S. courts and to liability for money damages.

These risks are starkly illustrated by this very case. Acting at the direction of senior DEA officials who had obtained a valid indictment against respondent and a valid warrant for his arrest, petitioner was ultimately held liable based on a highly technical interpretation of the statutory authority of DEA agents to engage in extraterritorial enforcement activities. This holding can only deter other would-be assistants in the wars on terrorism and international crime.

This Court has recognized that decisions affecting national security

> should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion.

Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). In light of the Constitution's allocation of national security responsibilities, there should be a strong presumption that, in the absence of compellingly clear evidence to the contrary, Congress does not intend courts to imply causes of action that can undermine the executive's national security efforts. And, once again, there is no evidence that, in enacting the ATS, Congress intended to authorize judicial actions that could cause such interference. To the contrary, as petitioner has shown, the founding generation repeatedly sought to ensure compliance with the

law of nations in order to protect the Nation from wars of reprisal. Those efforts belie any attempt to imply a cause of action under the ATS that can undermine national security efforts.

C. Judicial Implication Of A Cause Of Action Has Led Courts To Usurp The Responsibility Of The Political Branches To Decide Whether And When International Norms Should Be Binding.

Because the ATS does not create a cause of action, it sets forth none of the necessary elements for a claim, including any liability standard. As a result, lower courts have embarked on the quixotic task of attempting to identify which international law norms are sufficiently binding to create tort liability. The Second Circuit, which inaugurated this practice, has recently lamented its myriad pitfalls:

> [T]he relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law . . . is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source. All of these characteristics give the body of customary international law a soft, indeterminate character.

Flores v. *Southern Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003) (citation, footnote and internal quotation marks omitted).

The inherent unmanageability of this task is sufficient, by itself, to confirm that the first Congress did not intend federal courts to imply or create a cause of action under the ATS. In addition, the necessity of establishing liability standards in the absence of congressional guidance has given rise to a far more significant problem: usurpation of the constitutional powers and responsibilities of the political branches to decide which international norms are binding in the United States.

In concluding that arbitrary arrest and detention is a violation of customary international law, the Ninth Circuit relied in this case on, among other things, the American Convention on Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights, and the Universal Declaration of Human Rights. Pet. App. at 25a-26a & n.17. The Senate, however, has *refused to ratify* the American Convention on Human Rights. The United States is not a party to either the European Convention or the African Charter. And, while the Senate has ratified the ICCPR, the Senate and the Executive Branch have expressly agreed that this treaty is not self-executing and may not be relied upon by individuals in domestic court proceedings. See S. Exec. Rep. No. 102-23, at 9, 19, 23 (1992); 138 Cong. Rec. S4781, S4783-84 (daily ed. Apr. 2, 1992). The Universal Declaration of Human Rights, in turn, is not a treaty at all, but a *non-binding* United Nations resolution that the United States approved on the express understanding that it was *not* a "statement of law or of legal obligation[s]." 1 *Digest of International Law* § 2, at 53 (M. Whiteman ed., 1963) (quoting statement of Eleanor Roosevelt) (internal quotation marks omitted).

The Constitution prescribes very specific procedures, including a super-majority voting requirement, before a treaty becomes binding law under the Supremacy Clause. U.S. Const. art. II, § 2, cl. 2. Those procedures, of course, include no role for the courts. By purporting to derive "specific, universal and obligatory" norms from unratified treaties, treaties ratified subject to qualifications, and non-binding U.N. resolutions, the court below circumvented these constitutionally prescribed steps, cf. *INS* v. *Chadha*, 462 U.S. 919, 956-58 (1983) (requiring adherence to constitutionally specified steps for enacting federal legislation), and improperly usurped the prerogative of the political branches

to decide whether certain norms of international law should be binding and enforceable in U.S. courts. *Miller* v. *French*, 530 U.S. 327, 341 (2000) (the "Constitution prohibits one branch from encroaching on the central prerogatives of another"). Although Congress can expressly incorporate international law into federal law, and has occasionally done so, see *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 157 (1820) (statute prohibited piracy "'as defined by the law of nations'"), respect for separation-of-powers principles compels courts to refrain from purporting to derive enforceable norms from non-binding documents absent a congressional directive to do so. See, *e.g.*, *Al Odah* v. *United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (Randolph, J., concurring) (practice of having federal courts "discover" binding legal norms "among the writings of those considered experts in international law and in treaties that the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers"), *cert. granted*, 124 S.Ct. 534 (2003). And, as petitioner has shown, no such directive can be found in the ATS. See *supra* at 27-33.

This practice, moreover, gives rise to a second separation-of-powers violation. Because customary international law is derived from the consensus of nations, the political branches have a role to play in shaping that consensus. Thus, "[w]hen articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, . . . but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns." *Sabbatino*, 376 U.S. at 432-33. Indeed, from the very outset, "the United States endeavored to influence the development of the law of nations by asserting diplomatic positions that at times were in opposition to established international law." Jay, *supra*, at 846. See also *Brown* v. *United States*, 12 U.S. (8 Cranch.) 110, 128 (1814) (Marshall, C.J.) (noting that the usages of other nations "is a guide which the sovereign

follows or abandons at his will"). By purporting to derive binding norms from international legal standards that the political branches have not incorporated into U.S. law, federal courts impermissibly interfere with the ability of the political branches to influence and shape those very norms.

Indeed, this case illustrates the risk of such interference. Balancing the harms to our foreign relations against national law enforcement needs and interests, the Executive Branch chose to authorize the abduction of a Mexican citizen from Mexico rather than seek extradition pursuant to treaty. By condemning this action as a violation of binding international law, the Ninth Circuit interfered with the Executive Branch's ability to develop a consensus that such conduct does not violate customary international legal norms. This interference underscores, once again, the impropriety of judicial implication or creation of a cause of action in the absence of the clearest evidence that Congress meant to authorize suits under the ATS. Cf. *Sabbatino*, 376 U.S. at 432 (judicial refusal to entertain recognized cause of action justified by the "serious and far-reaching consequences [that] would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary").

D. Congress Has Not Ratified Judicial Implication Or Creation Of A Cause Of Action Under The Alien Tort Statute.

Faced with overwhelming evidence that the first Congress did not intend to create any cause of action under the ATS—let alone one capable of interfering with the ability of the political branches to manage foreign affairs, protect national security, and shape international norms—ATS proponents and lower courts have argued that Congress ratified judicial implication of a cause of action under the ATS by enacting the Torture Victim Protection Act ("TVPA") in 1992. The TVPA creates an express cause of action for aliens as well as U.S. citizens to seek redress for a discrete set of torts that

violate international law—*i.e.*, extra-judicial killings and torture. Pub. L. No. 102-256, § 2, 106 Stat. at 73. The accompanying House Report stated that the TVPA "would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under . . . section 1350," cited *Filartiga* with approval, and stated that the ATS "should not be replaced." H.R. Rep. No. 102-367, at 3 (1991). Reliance on these statements, however, is misplaced. Indeed, the TVPA undermines the reasoning of *Filartiga* and the courts that have followed its lead.

First, it is the intent of the *enacting* Congress, not the views expressed in a report by a subsequent Congress, that controls the scope and meaning of the ATS. See *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988) (dismissing views expressed in 1984 committee report concerning the meaning of 1974 enactment). Second, the actions of the 102nd Congress undermine, rather than support, implication of an ATS cause of action. If the ATS already granted aliens the right to sue for *all* tortious violations of binding international legal norms, then Congress did not need to create an express cause of action for aliens that covers a very narrow category of such violations. The TVPA authorizes damages awards only against those individuals "who, under actual or apparent authority, or color of law, of any foreign nation," subject another to "extrajudicial killing" or "torture," Pub. L. No. 102-256, § 2, 106 Stat. at 73. Congress, in turn, provided detailed definitions for the latter term. *Id.* § 3, 106 Stat. at 73-74. The clear inference to be drawn from this action is that aliens do not have a cause of action to sue for other alleged violations of international law, such as a detention of less than 24 hours that results in no physical injury and is carried out under "actual or apparent authority" of this country, not a foreign nation.

Indeed, in addition to providing a detailed liability standard, the TVPA also sets forth an exhaustion requirement and a statute of limitations. *Id.* § 2(b)-(c), 106 Stat. at 73. The

TVPA is thus precisely the type of subsequently enacted cause of action that the first Congress anticipated when it granted the new district courts concurrent "cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations." The TVPA also provides the clear authorization needed to eliminate the separation-of-powers concerns that would otherwise arise from suits in which U.S. courts passed legal, moral and factual judgment on conduct that occurs within the borders of other nations and that involves exercises of foreign governmental authority. The TVPA thus highlights the impropriety of implying a cause of action to enforce international legal norms where, as here, there is no evidence that the enacting Congress intended to authorize such actions.

IV. IF A CAUSE OF ACTION IS IMPLIED UNDER THE ALIEN TORT STATUTE, IT SHOULD EXTEND ONLY TO THOSE NORMS TO WHICH THE UNITED STATES HAS ASSENTED.

Should the Court conclude, despite all of the foregoing, that it is proper to imply a cause of action, or derive federal common law-making power, from the ATS's jurisdictional grant, the Court must undertake the difficult task of defining the scope and content of that action. See generally Brief for the National Association of Manufacturers as *Amicus Curiae* in Support of Reversal at 17-21. Indeed, delimiting the range of actionable torts that violate the law of nations is crucial, as plaintiffs have demonstrated creativity in the range of putative offenses they would bring within the statute's ambit.[14] Petitioner submits that any such cause of action must be limited to suits for violations of international legal norms that the political branches of the United States have accepted.

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[14] *See, e.g.*, *Flores*, 343 F.3d at 145 (claims for violations of "'right to life' [and] 'right to health'" from intranational pollution); *Aguinda* v. *Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (environmental claims); *Zapata* v. *Quinn*, 707 F.2d 691 (2d Cir. 1983) (claim for loss of money from distribution system of state lottery).

Such a limitation minimizes—though it does not eliminate—the difficulties of defining an implied cause of action and the separation-of-power problems inherent in doing so.

As noted above, the Second Circuit has candidly acknowledged that binding norms of customary international law cannot be found in "any single, definitive, readily identifiable source," but instead must be divined from the custom and practices of governments as shown in "myriad decisions made in numerous and varied international and domestic arenas," using evidence that is "widely dispersed and generally unfamiliar to lawyers and judges." *Flores*, 343 F.3d at 154. If, however, a judicially implied or created cause of action under the ATS is limited to those norms to which the United States subscribes, courts will only be forced to decide whether an alleged norm has actually achieved the status of customary international law if the United States has assented to it. If the United States has not done so, that is the end of the inquiry.

The United States generally makes its assent known through treaties, executive agreements, and federal laws that are readily identifiable. In addition, certain international norms, known as *jus cogens* norms, govern matters of such universal concern, and their violation is so universally condemned, that U.S. assent might be inferred. Thus, for example, U.S. assent to *jus cogens* norms such as prohibitions on genocide, crimes against humanity and slavery, see Ian Brownlie, *Principles of Public International Law* 489 (6th ed. 2003), might be inferred from the United States' role in the Nuremburg trials and from the Civil War-era amendments to the Constitution.

Limiting a judicially implied cause of action to suits seeking to enforce norms to which the United States has assented eliminates a number, though certainly not all, of the separation-of-powers problems noted above. Most significantly, courts enforcing such norms will not usurp the role of the political branches to shape and influence the

development of international norms, or to determine which norms should be binding. Such a limitation should also reduce judicial interference with the ability of the political branches to manage foreign relations and protect national security. If, for example, Congress and the President had assented to an international norm that prohibits governmental abduction of aliens on foreign soil, judicial enforcement of that norm under an implied cause of action would not interfere with national security efforts, inasmuch as the political branches already would have prevented the Executive Branch from employing such a tool to protect the Nation. Cf. Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1981) ("[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination"). See also *The Paquete Habana*, 175 U.S. at 712 (construing presidential proclamations to have bound the United States to maintain a naval blockade of Cuba in accordance with the law of nations).

Under such a limitation, respondent's claim necessarily fails. As noted above, in finding that petitioner had violated a customary international legal norm that did not rise to the level of a *jus cogens* violation, the Ninth Circuit relied on two treaties to which the United States is not a party, another treaty that the Senate has refused to ratify, and a non-binding U.N. resolution that the United States approved on the understanding that it did not create any legal norms. See *supra* at 41. Although the Ninth Circuit did rely on one treaty that the United States has ratifed, the United States did so on the condition that the treaty's norms would not be enforceable in U.S. courts. *Id.* That condition necessarily forecloses reliance on a judicially implied cause of action to enforce the norms of that treaty.

V. PETITIONER DID NOT VIOLATE CUSTOMARY INTERNATIONAL LAW.

Even if, *arguendo*, a cause of action can properly be inferred or created under the ATS for torts in violation of the

law of nations, no such violation occurred here. Respondent's detention, which lasted less than 24 hours, resulted in no physical harm to him, and was undertaken on a case-specific basis by a private citizen following instructions from U.S. law enforcement officials, offends no rule of customary international law.

The Ninth Circuit found that petitioner violated a rule of customary international law that prohibits arbitrary detention of any duration. As the United States has shown, U.S. Br. at 17-40, respondent's detention was not "arbitrary" at all, but was instead statutorily authorized. That showing, which petitioner incorporates by reference here, is dispositive.

In addition, separation-of-powers principles preclude the Ninth Circuit's determination that respondent's limited detention violated customary international law. Even if the Court concludes that the ATS authorizes courts to derive enforceable legal norms from customary international law, those norms cannot be based, as they were here, on treaties that the United States has refused to ratify, or that it has ratified subject to the express reservation that the treaty shall not create rights enforceable in U.S. courts. Thus, the Ninth Circuit not only purported to decide an issue that, under the Constitution, the political branches are assigned responsibility to decide (*i.e.*, which international legal norms should be binding as a matter of U.S. law), the lower court chose to *contradict* a decision that the political branches had already made. Because courts plainly have no authority to override such political branch judgments, the Ninth Circuit's holding that petitioner violated a binding norm of international law was constitutionally impermissible.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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January 23, 2004

APPENDIX A

Chap. XX.—*An Act to establish the Judicial Courts of the United States.*

STATUTE I.

Sept. 24, 1789.

* * * *

SEC. 9. *And be it further enacted*, That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all

District courts exclusive jurisdiction.

[Acts of June 5, 1794, sect 6; act of Feb. 13, 1807; act of March 3, 1815, sect.4.]

Original cognizance in maritime causes and of seizure under the laws of the United States.

Concurrent jurisdiction.

causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

Trial of fact by jury.

* * * *

APPROVED, September 24, 1789.

APPENDIX B

JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789

VOLUME XXI
NOV. 23, 1781

Resolved, That it be recommended to the legislatures of the several states to provide expeditious, exemplary and adequate punishment:

First. For the violation of safe conducts or passports, expressly granted under the authority of Congress to the subjects of a foreign power in time of war:

Secondly. For the commission of acts of hostility against such as are in amity, league or truce with the United States, or who are within the same, under a general implied safe conduct:

Thirdly. For the infractions of the immunities of ambassadors and other public ministers, authorised and received as such by the United States in Congress assembled, by animadverting on violence offered to their persons, houses, carriages and property, under the limitations allowed by the usages of nations; and on disturbance given to the free exercise of their religion: by annulling all writs and processes, at any time sued forth against an ambassador, or other public minister, or against their goods and chattels, or against their domestic servants, whereby his person may be arrested: and,

Fourthly. For infractions of treaties and conventions to which the United States are a party.

The preceding being only those offences against the law of nations which are most obvious, and pubic faith and safety requiring that punishment should be co-extensive with such crimes:

Resolved, That it be farther recommended to the several states to erect a tribunal in each State, or to vest one already existing with power to decide on offences against the law of nations, not contained in the foregoing enumeration, under convenient restrictions.

Resolved, That it be farther recommended to authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury doent to a foreign power by a citizen.

APPENDIX C

ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 1784

An Act for securing to Foreigners in this State, their Rights, according to the Laws of Nations, and to prevent any Infractions of said Laws.

Be it enacted by the Governor, Council and Representatives, in General Court assembled, and by the Authority of the same, That the Superior Court, and the several County Courts in this State (within their respective Limits) be, and they are hereby impowered and directed to proceed against and punish all such Persons as shall be guilty of the Violation of any Safe-Conduct or Passport granted under the Authority of the Congress of the United States of *America*, or under the Authority of this State, to the Subjects of any foreign Power in Time of War.

Any also against all such Persons as shall be guilty of the Commission of any Acts of Hostility against the Subjects of any Prince or Power in Amity, League, or Truce with the United States of *America*, or such as are within this State under a general implied Safe-Conduct.

And also against all such as shall be guilty of any Violation or Infraction of the Immunities of Ambassadors, or other public Ministers, authorized and received as such by the United States in Congress assembled, or of any Violence offered to the Persons of such Ambassadors, or Ministers, their Houses, Carriages or Property, under the Limitation allowed by the Laws and Usages of Nations, or that shall any Ways molest or disturb them in the free Exercise of their Religion.

And be it further enacted by the Authority aforesaid, That no Writ or Process shall at any Time issue, or be maintained

against any such Ambassador or public Minister, authorized and received as aforesaid, or against his Goods or Chattels, or against his domestic Servant, whereby his Person may be arrested, in any Civil Action.

And be it further enacted by the Authority aforesaid, That the said Courts respectively be, and they are hereby authorized and impowered to hear, try and determine, by a Jury or otherwise (according to Law) any of the Matters aforesaid, or any other Infractions or Violations of, or Offences against the known, received and established Laws of civilized Nations, agreeable to the Laws of this State, or the Laws of Nations.

And be if further enacted by the Authority aforesaid, That if any Injury shall be offered and done by any Person or Persons, whatsoever, to any foreign Power, or to the subjects thereof, either in their Persons or Property, by Means whereof any Damage shall or may in any Wise arise, happen or accrue, either to any such foreign Power, to the said United States, to this State, or to any particular Person, the Person or Persons offering or doing any such Injury, shall be liable to pay and answer all such Damages as shall be occasioned thereby.

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Supreme Court, U.S.
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No. 03-339

In the Supreme Court of the United States

JOSÉ FRANCISCO SOSA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONER

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QUESTIONS PRESENTED

Section 1350 of Title 28 of the United States Code provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The questions presented are:

1. Whether Section 1350 creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdiction-granting provision that does not establish private rights of action.

2. Whether, to the extent that Section 1350 is not merely jurisdictional in nature, the challenged arrest in this case is actionable under Section 1350.

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In the Supreme Court of the United States

No. 03-339

JOSÉ FRANCISCO SOSA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONER

Pursuant to Rule 12.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, a respondent in this case (No. 03-339), respectfully submits this brief in support of petitioner Sosa.[1]

STATEMENT

1. In 1985, Special Agent Enrique Camarena-Salazar of the Drug Enforcement Administration (DEA) was abducted by members of a Mexican drug cartel and brought to a house in Guadalajara, Mexico. He was tortured there for two days to extract information concerning the DEA's knowledge about the cartel, and then he was murdered. Eyewitnesses

[1] The United States is a party to this action and filed its own petition for a writ of certiorari (No. 03-485) seeking review of the court of appeals' decision in this case, raising additional questions concerning respondent Alvarez-Machain's separate claims against the United States. On December 1, 2003, this Court granted the United States' petition. The United States is filing a separate brief in No. 03-485.

placed Alvarez-Machain, a Mexican citizen, at the house while Camarena-Salazar was being tortured. DEA officials believed that Alvarez-Machain, "a medical doctor, participated in the murder by prolonging Camarena-Salazar's life so that others could further torture and interrogate him." *Alvarez-Machain* v. *United States*, 504 U.S. 655, 657 (1992); see Pet. App. 4a.[2]

In 1990, a federal grand jury indicted Alvarez-Machain for the torture and murder of Camarena-Salazar in violation of, *inter alia*, 18 U.S.C. 1201(a)(4) and 1203(a) (1988). The United States District Court for the Central District of California issued a warrant for his arrest. The DEA attempted to obtain Alvarez-Machain's presence in the United States through informal negotiations with Mexican officials. *Alvarez-Machain*, 504 U.S. at 657 n.2. After those efforts failed, the DEA approved the use of Mexican nationals, including Sosa, to take custody of Alvarez-Machain in Mexico and transport him to the United States. Several Mexican nationals, acting at the behest of the DEA, seized Alvarez-Machain in Mexico. In less than 24 hours, they transported him to the United States in a private plane, and into the custody of United States law enforcement officials. Pet. App. 5a.

Alvarez-Machain moved for dismissal of the indictment against him, arguing that he could not be tried in the United States because his seizure from Mexico was contrary to international law and the extradition treaty between the United States and Mexico. The district court and the Ninth Circuit agreed, ordering that the charges be dismissed and that Alvarez-Machain be returned to Mexico. This Court reversed. Alvarez-Machain's arrest, the Court held, "was not in violation of the Extradition Treaty." *Alvarez-Machain*, 504 U.S. at 670. Even if the arrest violated international law, the Court further held, Alvarez-Machain could be tried in this country. *Ibid.* The case was remanded for trial, which took place in 1992. At the close of the government's case, the district court granted Alvarez-Machain's motion for a judgment of acquittal. Pet. App. 6a.

2. In 1993, after returning to Mexico, Alvarez-Machain filed this civil action in the United States District Court for the Central District of California, asserting tort claims against the United States, DEA officials, Sosa, and certain unnamed Mexican civilians. The complaint sought, *inter alia*, to hold the United States liable for false arrest under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), 2671-2680, and Sosa liable for an asserted tort in violation of international law. He based the latter claim on 28 U.S.C. 1350 (Section 1350), which is sometimes referred to as the Alien Tort Statute (ATS). The district court dismissed Alvarez-Machain's FTCA claims against the United States. However, the court granted summary judgment for Alvarez-Machain on his claim against Sosa, reasoning that recovery was available because, the court believed, Alvarez-Machain's arrest and detention violated international law. After a trial, the court awarded $25,000 in damages against Sosa for the transborder abduction of Alvarez-Machain and his detention in Mexico. Pet. App. 6a-7a.

3. Alvarez-Machain and Sosa filed separate appeals. In 2001, the Ninth Circuit affirmed in part and reversed in part. Pet. App. 109a-139a. The court affirmed "the district court's judgment with respect to [petitioner] Sosa's liability under [Section 1350]." *Id.* at 139a. In so holding, the court concluded that Alvarez-Machain's "detention was arbitrary and, therefore, violated the 'law of nations.'" *Id.* at 119a. In addition, the court reversed the district court's dismissal of Alvarez-Machain's FTCA claims against the United States

[2] The "Pet. App." citations in this brief are to the appendix to the petition in No. 03-339.

and held that Alvarez-Machain could sue the United States for the tort of false arrest. *Id.* at 139a.

4. The Ninth Circuit granted rehearing en banc, withdrew the initial panel's decision, and, in a 6-5 decision, reached the same result as the initial panel. Pet. App. 1a-108a.

a. In considering Alvarez-Machain's claim against Sosa, the en banc court reaffirmed its prior case law concerning the scope of Section 1350. Pet. App. 8a-14a. The court explained that the Ninth Circuit has "resolved that [Section 1350] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." *Id.* at 10a. Furthermore, drawing from its case law, the Ninth Circuit rejected as too "restrictive" Sosa's argument "that only violations of *jus cogens* norms, as distinguished from violations of customary international law, are sufficiently 'universal' and 'obligatory' to be actionable as violations of 'the law of nations' under [Section 1350]." *Id.* at 11a.

Applying that understanding, the en banc court held that an "arbitrary" extraterritorial arrest is an actionable violation of international law pursuant to Section 1350. The court first concluded that "there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention," relying in particular on provisions of the Universal Declaration of Human Rights (Universal Declaration), G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948); the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A, 21st Sess., U.N. Doc. A/6316 (1966); and the *Restatement (Third) of the Foreign Relations Law of the United States* (1987). See Pet. App. 25a-26a & n.18. The court then concluded that Alvarez-Machain's arrest was arbitrary, and thus an actionable violation of the law of nations under the Ninth Circuit's construction of

Section 1350, because, the court held, the arrest was not authorized by United States or Mexican law. *Id.* at 29a-44a.

b. Judge O'Scannlain, joined by Judges Rymer, Kleinfeld, and Tallman, dissented. Pet. App. 72a-96a. Judge O'Scannlain found "astounding" the majority's decision "divin[ing] the entitlement to recovery from [Section 1350]" based on the alleged violation of international law in this case. *Id.* at 73a. Although he assumed that some violations of international law may be actionable under Section 1350, Judge O'Scannlain concluded that a "norm" of international law "to which the political branches of our government have refused to assent" is not actionable under Section 1350, and that "[i]t is not the judiciary's place to enforce such a norm contrary to their will." *Id.* at 81a; see *id.* at 80a.

After considering the actions of the political branches in this area, Judge O'Scannlain concluded that "[t]he United States does not, as a matter of law, consider itself forbidden by the law of nations to engage in extraterritorial arrest, but reserves the right to use this practice when necessary to enforce its criminal laws." Pet. App. 86a-87a (footnote omitted). Regarding the claimed private right of action, Judge O'Scannlain observed that the ICCPR "was signed and ratified in 1992 but with the understanding by the Senate and Executive Branch that [the relevant provisions] are not self-executing and may not be relied on by individuals," and that the political branches have refused to recognize that the Universal Declaration creates "binding legal obligations." *Id.* at 87a n.12. Judge O'Scannlain also concluded that "the DEA was well within its delegated powers [under domestic law] when arresting Alvarez." *Id.* at 92a.

In Judge O'Scannlain's view, "[t]he decision to exercise the option of transborder arrest as a tool of national security and federal law enforcement is for the political branches to make." Pet. App. 96a. He explained that the political

branches, "unlike the courts, may be held accountable for any whirlwind that they, and the nation, may reap because of their actions. By its judicial overreaching, the majority has needlessly shackled the efforts of our political branches in dealing with complex and sensitive issues of national security," *ibid.*, including, Judge O'Scannlain observed, the "international war on terrorism." *Id.* at 72a.

c. Judge Gould filed a separate dissent. Pet. App. 97a-108a. He concluded that "this case presents a nonjusticiable political question requiring scrutiny of an executive branch foreign policy decision." *Id.* at 97a; see *id.* at 103a-104a.

SUMMARY OF ARGUMENT

The Ninth Circuit erroneously held that Alvarez-Machain has established an actionable claim against Sosa under 28 U.S.C. 1350 (Section 1350) for alleged violations of customary international law norms in connection with his arrest in Mexico.

I. The Ninth Circuit erred, as a threshold matter, in concluding that Section 1350 is anything other than a grant of jurisdiction. By its terms, Section 1350 simply confers jurisdiction on the federal courts over a specified class of cases. It does not expressly confer any private right of action, it contains no language from which it might be possible to *infer* a private right, and, in particular, it lacks the "rights-creating language" that is "critical" to the creation of a private right of action. *Alexander* v. *Sandoval*, 532 U.S. 275, 288 (2001). The conclusion that Section 1350 is purely a jurisdictional measure is supported by the fact that when Congress originally enacted Section 1350 it did so as part of the legislation that organized the federal courts and delineated their jurisdiction, and that when Congress has recodified Section 1350 in the past century, it has, again, done so as part of comprehensive legislation addressed to the organization and jurisdiction of the federal courts.

The history of the usage of Section 1350 also strongly suggests that it is strictly jurisdictional and does not, as the Ninth Circuit held, create a cause of action for the violation of the law of nations and treaties. From its enactment in 1789 until 1980, Section 1350 was invoked only rarely in the federal courts and only then as a potential alternative basis for jurisdiction. It was not until *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), that the modern conception of Section 1350—a far-reaching cause of action on behalf of aliens for violations of international law anywhere in the world—took life and then spread. As this Court has observed in a similar vein, the most logical reason that a "revolutionary" new meaning of an "old judiciary enactment" was not recognized by judges earlier is that "it is not there." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370 (1959).

II. If Section 1350 is interpreted consistent with its clear terms to provide a grant of jurisdiction, and nothing more, then there is no basis for finding a cause of action in this case. Sources of customary international law, such as the U.N. resolution relied on by the Ninth Circuit, do not remotely provide a basis for inferring a cause of action. Indeed, far from finding any intent to create a cause of action in an Act of Congress, the Ninth Circuit relied on international agreements that the political branches had *refused* to ratify, like the American Convention on Human Rights, or had ratified only on the condition that they were *not* privately enforceable, like the ICCPR. That judicial exercise was profoundly out of line with the separation of powers. Likewise, nothing in Section 1350 provides a charge to federal courts to divine a federal common law of the law of nations, akin to the constitutionally grounded practice in admiralty.

The Constitution commits to the political branches, and not the courts, the responsibility for managing the Nation's

foreign affairs. In particular, the Constitution commits to the Legislative Branch the authority to "define and punish * * * Offences against the Law of Nations." Art. I, § 8, Cl. 10. That textual commitment was based on the Framers' recognition of the indeterminate and malleable nature of customary international law. The Constitution also proscribes special procedures for the consideration and approval of treaties with foreign nations. The Ninth Circuit's decision in this case permits a court to circumvent those constitutional procedures and to both define the law of nations that is enforceable in a damages action in United States courts and recognize private rights that are at odds with the statements and actions of the political branches in deciding to ratify treaties, or not, and on what terms.

The nature and variety of suits under Section 1350 that have proliferated in the lower courts in the two decades since the Second Circuit decided *Filartiga* underscore the potential that such litigation has for interfering with the conduct of sensitive diplomatic matters entrusted to the political branches. That experience magnifies the gravity of the separation-of-powers problems created by the Ninth Circuit's construction of Section 1350, and the need for this Court to correct the fundamentally mistaken understanding of Section 1350 that has emerged in the lower courts in the past two decades and that the Ninth Circuit applied in this case.

III. The Ninth Circuit also erred in concluding that Section 1350 applies to alleged torts, such as the one in this case, that occur outside the United States. The longstanding presumption is that, unless a statute contains a contrary expression or touches on certain special concerns, the statute applies only within the territory of the United States, or, in limited circumstances, on the high seas. That presumption is designed to prevent unintended clashes between the laws of this country and those of other nations and, thereby, to prevent international discord. The presumption accordingly has special force in the context of Section 1350. There is no basis to conclude that Section 1350 establishes a roaming cause of action that permits aliens to come to United States courts and recover money damages for violations of international law anywhere around the globe.

ARGUMENT

THE NINTH CIRCUIT ERRED IN HOLDING THAT ALVAREZ-MACHAIN HAS STATED AN ACTIONABLE CLAIM TO RECOVER DAMAGES FOR ALLEGED VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW NORMS IN CONNECTION WITH HIS ARREST IN MEXICO

This case (No. 03-339) concerns the proper interpretation and application of 28 U.S.C. 1350 (Section 1350). What is now Section 1350 originated as part of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, the legislation that laid the foundation for the Nation's federal courts. For the next 190 years, that provision was invoked only rarely in federal cases as a potential source of jurisdiction and thus remained on the books only as an obscure vestige of the First Judiciary Act—"a kind of legal Lohengrin." *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.). In 1980, however, the Second Circuit—the first court of appeals to expound on Section 1350—held that a damages action could be brought under Section 1350 by Paraguayan citizens against a Paraguayan official for the alleged torture and killing of a family member in Paraguay. *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (1980).

Since *Filartiga*, litigation brought pursuant to Section 1350 has proliferated in the Second Circuit and other federal courts of appeals, like the Ninth Circuit, which have concluded that Section 1350 not only is a grant of jurisdiction, but also creates a cause of action on behalf of aliens for the

violation of customary international law norms—anywhere in the world. That construction of Section 1350 misconstrues the role of the courts in interpreting jurisdictional provisions and, in practical effect, has thrust the courts into foreign-affairs matters that the Constitution assigns to the political branches. In this case, for example, the Ninth Circuit held that an actionable claim exists under Section 1350 based on the alleged violation of customary international norms that the court derived from international agreements and declarations that the political branches either have refused to ratify, or have ratified based only on the condition that the instrument is not self-executing and, thus, not privately enforceable in United States courts. Pet. App. 25a-26a.

As explained below, the Ninth Circuit's understanding and application of Section 1350 is fundamentally flawed in at least three critical respects. First, the terms, statutory history, and sparing usage of the provision from 1789 until 1980 compel the conclusion that it is purely a jurisdictional provision and, thus, not a source of any substantive rights. Second, in our constitutional system, a private right of action under federal law must stem from an Act of Congress that affirmatively confers such rights. Such a right of action cannot be furnished by a federal court drawing from indeterminate and malleable sources of customary international law. None of the instruments on which the Ninth Circuit relied in canvassing international law norms in this case remotely provides an adequate basis for inferring a cause of action. Third, Section 1350 does not apply extraterritorially to claims based on alleged violations of international law occurring in a foreign country. The Ninth Circuit's judgment in this case accordingly should be reversed.

I. 28 U.S.C. 1350 IS PURELY A GRANT OF JURISDICTION AND THUS PROVIDES NO BASIS FOR INFERRING A CAUSE OF ACTION

A. This Court Has Refused To Infer A Private Right Of Action In The Absence Of Specific Statutory Language Creating A Cause Of Action

1. This Court has recently articulated the basic principles governing the determination whether a private right of action exists under federal law. First, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Second, in determining whether Congress has created such rights, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy"—"[s]tatutory intent * * * is determinative." *Ibid.* Third, in divining Congress's statutory intent, the Court focuses on the text of the statute and, in particular, looks for "'rights-creating' language." *Id.* at 288. Finally, if the statute does not create a cause of action, then "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-287.

In *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 67 n.3 (2001), this Court reiterated that it has "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one," and the Court's recent decisions in this area of law exemplify that admonition. In *Malesko* itself, for example, the Court declined to extend the right of action inferred in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to a new context, noting that *Bivens* in turn had relied on earlier decisions of this court recognizing private rights of action under federal statutes under a mode of analysis that

this Court has since "abandoned." See 534 U.S. at 74-75. See also, *e.g.*, *Sandoval*, 532 U.S. at 293 (Title VI does not create a private right of action to enforce disparate-impact regulations); *FDIC* v. *Meyer*, 510 U.S. 471, 483-486 (1994) (declining to infer private right of action under *Bivens* against a federal agency).

2. A natural corollary to this Court's refusal to infer a cause of action in the absence of rights-creating language is the Court's recognition that jurisdictional statutes do not create causes of action. For example, 28 U.S.C. 1332 provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds [a certain amount] and is between * * * citizens of different states." But Section 1332 does not contain any rights-creating language and it is beyond dispute that it creates no right of action. Rather, as Justice Jackson wrote for the Court more than 50 years ago, "[t]he Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources." *Montana-Dakota Co.* v. *Northwestern Pub. Serv.*, 341 U.S. 246, 249 (1951).

Numerous decisions of this Court are to the same effect. For example, in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 577 (1979), the Court rejected the contention that Section 27 of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. 78aa, conferred a private right of action for damages on behalf of brokerage firm customers for losses arising from misstatements in financial reports required by Section 17(a) of the 1934 Act, 15 U.S.C. 78q(a). The Court explained that "Section 27 grants jurisdiction to the federal courts" and "creates no cause of action of its own force and effect; it imposes no liabilities." 442 U.S. at 577.[3] As a result,

[3] Section 27 of the 1934 Act provides in part: "The district courts of the United States * * * shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. 78aa.

the Court held, "[t]he source of plaintiffs' rights must be found, if at all, in the *substantive* provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision." *Ibid.* (emphasis added). Significantly, in reaching that conclusion, the Court did "not now question the actual holding of [*J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964)]"—which the Court has since characterized as exemplifying its prior willingness to "ventur[e] beyond Congress's intent" in inferring rights of action, *Sandoval*, 532 U.S. at 287—but rather emphasized that even *Borak* did not support recognition of a private right of action based on a *jurisdictional* provision of the 1934 Act. 442 U.S. at 577.

The Court has reached a similar conclusion in construing the jurisdictional grant in the Tucker Act, 28 U.S.C. 1491, and the parallel grant in the Indian Tucker Act, 28 U.S.C. 1498. See, *e.g.*, *United States* v. *Navajo Nation*, 537 U.S. 488, 503 (2003); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 398 (1976). As this Court recently reiterated in *Navajo Nation*, while the Tucker Acts confer jurisdiction on the Court of Federal Claims, the Acts do not themselves create substantive rights to money damages. Rather, to state a claim under the Tucker Acts, a "plaintiff must invoke a rights-creating source of substantive law"—apart from the Tucker Acts—that itself establishes a private right to damages. 537 U.S. at 503; see *Mitchell*, 445 U.S. at 538; *Testan*, 424 U.S. at 398.

3. Applying those fundamental principles to the statute at issue in this case compels the conclusion that the Ninth Circuit erred in holding that "[Section 1350] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." Pet. App. 10a. Section 1350 is, as its plain and

simple terms suggest, a jurisdictional provision—nothing more and nothing less.

B. The Text And Statutory History Of Section 1350 Establish That It Is Strictly A Jurisdictional Measure

1. Section 1350 of Title 28 of the United States Code states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." By its terms, Section 1350 thus confers subject-matter jurisdiction on the federal district courts over a specified category of cases. It does not purport to confer private rights of action, and it contains no language from which a private right of action could be inferred, let alone the sort of "'rights-creating' language" that this Court has characterized as "critical" to determining that Congress intended to create a private right of action. *Sandoval*, 532 U.S. at 288; see *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284 n.3 (2003) ("Where a statute does not include * * * explicit 'right-or duty-creating language' we rarely impute to Congress an intent to create a private right of action.") (citing provisions with such rights-creating language).

2. The conclusion that Section 1350 grants only jurisdiction—and not a private right of action—is consistent with the terms of its original enactment in the Judiciary Act of 1789. That provision stated, in pertinent part, that the district courts shall have "*cognizance*, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an Alien sues for a tort only in violation of the law of Nations or a Treaty of the United States." Ch. 20, § 9, 1 Stat. 77 (emphasis added). When the First Congress met, the term "cognizance" was used to connote jurisdiction, *i.e.*, the "judicial authority." I Samuel Johnson, *A Dictionary of the English Language* (1755) ("Cognizance" means "1. Judicial notice; trial; judicial authority.") (1968); 3 William Blackstone, *Blackstone's Commentaries on the Laws of England* *42 (Wayne Morrison ed., 2001) (1783) (*Commentaries*) (noting that the court of the King's Bench "takes cognizance both of criminal and civil causes"). And Congress used the term cognizance throughout the Judiciary Act of 1789, see 1 Stat. 73-81, which, as this Court has recognized, "established the judicial courts of the United States, and defined their jurisdiction." *Buzard* v. *Houston*, 119 U.S. 347, 351 (1886).

At the same time, the First Congress used demonstrably different language when it intended to create private rights of action. For example, in An Act for the government and regulation of Seaman in the merchants Service, ch. 29, § 5, 1 Stat. 133, Congress provided that a seaman who abandons his vessel "shall be liable to pay [the master] all damages * * * and such damages shall be recovered with costs, in any court * * * having jurisdiction of the recovery of debts." Likewise, in one of the first copyright statutes, Congress provided that any individual who infringed a copyright would be "liable to suffer and pay to the said author or proprietor all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof." An Act for the encouragement of learning, ch. 15, § 6, 1 Stat. 125-126; see also An Act to promote the progress of useful Arts, ch. 7, § 4, 1 Stat. 111 (patent infringer "shall forfeit and pay to the said patentee * * * such damages as shall be assessed by a jury * * * which may be recovered in an action on the case founded on this act").

3. Congress's recodifications of Section 1350 from its original form in the First Judiciary Act into its present form in Title 28 of the United States Code confirm that it is just what it says: a jurisdiction-granting provision. Both times Congress reenacted and recodified Section 1350 in the past century, it did so as part of comprehensive legislation addressed to the organization and jurisdiction of the federal

judiciary, and not as part of legislation addressed to the creation (or maintenance) of private rights of action, much less legislation addressed to foreign policy issues. The Act of March 3, 1911, ch. 231, 36 Stat. 1087, was enacted "to codify, revise, and amend the laws relating to the judiciary." Chapter Two of the Act—which governed the "Jurisdiction" of "District Courts"—stated that "[t]he district courts shall have original jurisdiction as follows: * * * Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States." § 24, para. 17, 36 Stat. 1093. Similarly, the Act of June 25, 1948, ch. 646, 62 Stat. 869, was enacted "[t]o revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary.'" Part IV of the Act governed "Jurisdiction and Venue" of the federal courts. 36 Stat. 927. Chapter 85 of Part IV—entitled "District Courts; Jurisdiction"—set forth the current version of the statute found in 28 U.S.C. 1350. 36 Stat. 927. The immediate history of Section 1350—the actual statute before the Court in this case—thus confirms the conclusion that it is solely a jurisdictional grant.

C. The Limited Judicial Experience With Section 1350 From Its Original Enactment Until 1980 Supports The Conclusion That It Is Strictly A Jurisdictional Grant

Given that the plain text of Section 1350 and the statutory history discussed above point unmistakably to the conclusion that it is solely a jurisdiction-granting provision, it is highly doubtful that any secondary consideration could support the conclusion that Section 1350 not only grants jurisdiction, but also supplies a cause of action. That is especially true given the far-reaching foreign-policy and fundamental separation-of-power consequences of the interpretation—adopted by courts of appeals such as the Ninth Circuit—that Section 1350 supplies a cause of action for alleged violations of various U.N. declarations and treaties that themselves do not supply such a right. See Part II, *infra*. In any event, as

explained below, the exceedingly rare invocation of Section 1350 (and its statutory predecessors) from 1789 to 1980 powerfully confirms that it simply supplies jurisdiction, and not the free-ranging cause of action that the courts of appeals have recognized in the past two decades.

1. Although a great deal has been written about the history of Section 1350 since the Second Circuit's decision in *Filartiga*, not much is known for certain about the origins or original purpose of the law. Neither the recorded history of the Judiciary Act of 1789 nor the private writings of the Members of the First Congress expound in any depth on the provision. Moreover, the sparing invocation of the provision from 1790 to 1980 confirms that it was not designed to create the extraordinary cause of action that was ostensibly discovered by federal courts 190 years after the First Judiciary Act was passed. Likewise, Congress's decision to recodify the provision twice—in 1911 and 1948—after 122 and 159 years of relative judicial inactivity belies any claim that Congress intended the courts to infer causes of actions from the basic terms of Section 1350's jurisdictional grant.

In the decade following the enactment of the Judiciary Act of 1789, only two reported cases referred to the statutory provision now embodied in Section 1350—*Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). *Moxon* involved the capture of a foreign ship in United States territorial waters, and *Bolchos* involved the seizure of slaves on a foreign ship at a United States port. In each case, the courts considered Section 1350's predecessor only as a potential alternative basis for exercising subject-matter jurisdiction, in addition to the grant of exclusive jurisdiction in the First Judiciary Act over admiralty actions.

Then, from 1795 to 1980, the provision essentially "lapsed into desuetude." William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of*

the Law of Nations, 18 Conn. L. Rev. 467, 468 (1986); see *id.* at 469 n.7 (citing smattering of reported cases in which federal courts declined to exercise jurisdiction under what is now Section 1350 during the twentieth century). That changed only in 1980, when the Second Circuit issued its decision in *Filartiga*. Although there has been some debate about the scope of the court's holding in *Filartiga*, the Second Circuit has recently stated that, "[b]y allowing the plaintiffs' claim to proceed, the *Filartiga* Court not only held that [Section 1350] provides a jurisdictional basis for suit, but also recognized the existence of a private right of action *for aliens only* seeking to remedy violations of customary international law or of a treaty of the United States." *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 149-150 (2d Cir. 2003) (emphasis in original).

Since *Filartiga*, litigation asserting claims under Section 1350 for alleged violations of international law—relating to events and human rights abuses around the globe—has proliferated in the federal courts in this country that, like the Ninth Circuit, have construed Section 1350 and, through it, customary international law, as a source of private rights enforceable in a cause of action for damages in United States courts. See *Flores*, 343 F.3d at 149 ("Questions regarding the purpose and scope of the [ATS] did not attract substantial judicial attention until the latter part of the Twentieth Century, when the [ATS] was first recognized by a federal appellate court as a viable basis for relief in *Filartiga*."); Pet. App. 9a-10a; note 13, *infra*.[4]

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[4] This Court has not considered Section 1350, or any of its statutory predecessors, in detail. The underlying claim in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), which sought damages for the sinking of an oil tanker during the Falklands War, was brought under Section 1350. This Court, however, decided the case on foreign sovereign immunity grounds and therefore did not consider Section 1350. See *id.* at 434-435. In *O'Reilly de Camara* v. *Brooke*, 209 U.S. 45 (1908), the Court affirmed the dismissal of a complaint brought by a Spanish national who alleged that a member of the United States military had improperly extinguished the emoluments of her government office in Havana, Cuba, during the course of the military's occupation of Cuba under the treaty that ended the Spanish-American War. The complaint asserted jurisdiction under an earlier version of Section 1350. *Id.* at 48. The Court found several "technical difficulties" that supported the dismissal of the action, including that the Secretary of War and Congress itself had ratified the alleged act that served as the basis for the plaintiff's action. *Id.* at 50.

2. This Court has previously expressed skepticism about the sudden "discovery of new, revolutionary meaning in reading an old judiciary enactment." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-371 (1959). In *Romero*, the Court rejected a novel assertion of maritime jurisdiction under an 1875 Act of Congress. In writing for the Court, Justice Frankfurter observed:

> The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the [Judiciary] Act of 1875 was not uncovered by judges, lawyers or scholars for seventy-five years because it is not there.

Id. at 370-371. That presumption is also "powerful" with respect to the discovery made by the *Filartiga* court in 1980. Indeed, in the case of Section 1350, the passage of nearly *two centuries*, and not just 75 years, supports the conclusion that *Filartiga*'s discovery of a "revolutionary," new rights-creating dimension of Section 1350 was not uncovered earlier because it is not there.

The timing of the lower courts' discovery of a cause of action in Section 1350 is particularly striking when viewed in

light of the developments in this Court's own case law concerning the proper method for determining whether Congress intended to create a private right of action. In *Sandoval*, the Court emphasized that it had long since abandoned "the understanding of private causes of action that held sway 40 years ago when Title VI [of the Civil Rights Act of 1964]" (the statute at issue in *Sandoval*) was enacted, pointing to its decision in *Cort* v. *Ash*, 422 U.S. 66 (1975), as the dividing line. 532 U.S. at 287. So too, the Court in *Sandoval* rejected the argument that the fact that a statute was enacted at a time when the Court was more willing to supply rights of action that were not anchored in a statute's text calls for a different mode of interpreting the statute. *Id.* at 288.

In any event, the general legal context in which Section 1350 was first enacted is a wholly insufficient basis from which to infer a private right of action that is not remotely supported by the text of the statute. See *Sandoval*, 532 U.S. at 288 ("In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent that it clarifies *text*.") (emphasis added; citation omitted). That is especially true given that, as discussed above, the First Congress—like those that followed it—knew full well how to use rights-creating language when it wanted to create a private right of action for damages. See p. 15, *supra*.

The history of Section 1350 after its original enactment makes inference of a cause of action especially implausible today. As discussed above, no reported decision recognized a cause of action based only on Section 1350 in the decade following its original enactment in 1789, or in the following 190 years. Congress, moreover, twice recodified and revised (in minor ways) Section 1350 in the past century without expressing any indication that it viewed the statute as anything other than a jurisdictional grant. And, then, only in

1980—long after this Court had already "sworn off the habit of venturing beyond Congress's intent" in determining when a statute creates private rights, *Sandoval*, 532 U.S. at 287—did a court discover that Section 1350 supplied a cause of action.

D. The TVPA Exemplifies The Type Of Rights-Creating Language That Congress Uses When It Creates A Cause Of Action

The stark contrast between the jurisdiction-conferring language of Section 1350 and the rights-creating language of the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note), further underscores that the Ninth Circuit was fundamentally mistaken in concluding that Section 1350 itself creates a cause of action.

1. The TVPA, which was signed into law in 1992, creates a cause of action for torture and extrajudicial killing. Section 2 of the Act—entitled "ESTABLISHMENT OF CIVIL ACTION"—provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to "torture" or "extrajudicial killing shall, in a civil action, be liable for damages" to the individual or, in the case of death, his legal representative. § 2(a), 106 Stat. 73.

Furthermore, the TVPA is limited in important substantive and procedural respects, illustrating the care that Congress took in crafting the cause of action, and the kind of accommodations that Congress adopts when it expressly enacts causes of action that implicate delicate foreign policy concerns. First, Congress carefully defined the acts of "torture" and "extrajudicial killing" that were actionable. § 3, 106 Stat. 73. Second, Congress indicated a respect for foreign judicial systems and an appreciation for the difficulty of litigating claims based on actions overseas by imposing an exhaustion requirement on plaintiffs: "[a] court shall decline

to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." § 2(b), 106 Stat. 73. Third, Congress imposed a 10-year statute of limitations for claims brought under the TVPA. § 2(c), 106 Stat. 73.[5]

2. In at least two key respects, Congress's enactment of the TVPA underscores the error of the Ninth Circuit and other courts of appeals in construing Section 1350 to confer a cause of action. First, the TVPA demonstrates that Congress knows how to create explicit rights of action for a violation of what is defined as the law of nations when it wants to, and that Congress acts with great care in limiting the scope of the action and identifying the actionable violations of the law of nations. The danger of inferring a cause of action out of text that provides for jurisdiction and nothing more is that such text provides no clues as to how Congress would have resolved questions like exhaustion of local remedies if, contrary to fact, Congress had provided for a cause of action. Second, the TVPA is largely superfluous for aliens if Section 1350 is read to supply the type of cause of action inferred by the Ninth Circuit for violations of international law because Section 1350 would already supply a right of action in the Ninth Circuit to recover damages for alleged acts of torture and extrajudicial killing. Moreover, an alien would have little incentive to bring an action *under*

[5] The bill that became the TVPA was initially introduced in 1986 but was not enacted until 1991. During the course of its consideration of the TVPA, Congress, *inter alia*, narrowed the definition of torture to accommodate concerns expressed by some Members of Congress and added the exhaustion requirement and statute of limitations. See 138 Cong. Rec. 4176 (1992) (statement of Senator Grassley); 137 Cong. Rec. 2670 (1991) (statement of Senator Specter); 137 Cong. Rec. 34,785-34,794 (1991) (statement of Congressman Mazzoli). Thus, the final legislation was the product of careful deliberation and compromise.

the TVPA or comply with its exhaustion requirement when he could file under Section 1350 and invoke the unbounded cause of action inferred by the Ninth Circuit.

3. Although it noted the disagreement in the lower courts over whether "section 1350 can be used * * * absent an explicit grant of a cause of action by Congress," the Senate Committee Report stated that the TVPA was not intended to displace Section 1350, and that the cause of action that has been inferred under that provision "should remain intact." S. Rep. No. 249, 102d Cong., 1st Sess. 4-5 (1991) (referring to Judge Bork's concurring opinion in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 798-823 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985)); see also H.R. Rep. No. 367, 102d Cong., 1st Sess., Pt.1, at 4 (1991).

That legislative history is entitled to no weight in discerning the intent of the Congress that first enacted Section 1350 more than 200 years earlier, or of the subsequent Congresses that reenacted that provision without further elaboration. See *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000) (refusing to look to legislative history from 1986 setting forth "a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier"); *United States* v. *Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring). Moreover, as Judge Randolph recently observed, "the wish expressed in the committee's statement [about Section 1350] is reflected in no language Congress enacted; it does not purport to rest on an interpretation of § 1350; and the statement itself is legislative dictum." *Al Odah* v. *United States*, 321 F.3d 1134, 1146 (D.C. Cir. 2003) (concurring), cert. granted, 124 S. Ct. 534 (Nos. 03-334 and 03-343) (Nov. 10, 2003). In short, the contrast between the terms of Section 1350 and the TVPA says far more about the soundness of the Ninth Circuit's conclusion that *Section 1350* supplies a private right of action

than any statements in the legislative history accompanying the TVPA.[6]

II. NO CAUSE OF ACTION MAY BE INFERRED FROM CUSTOMARY INTERNATIONAL LAW NORMS THAT HAVE NOT BEEN AFFIRMATIVELY ADOPTED AND MADE ENFORCEABLE BY THE POLITICAL BRANCHES

Just as Section 1350 does not itself create a cause of action, a cause of action is not supplied by the instruments of international law relied on by the Ninth Circuit or, more generally, by some sort of federal-common-law theory. To the extent that the Ninth Circuit inferred a cause of action in this case directly from instruments of customary international law such as U.N. resolutions, or it did so based on a theory that Section 1350 empowered it to infer private rights of action from such instruments, its decision is also fundamentally mistaken.

A. The U.N. Declarations And Other Sources Of International Law Relied On By The Ninth Circuit Furnish No Basis For Inferring A Private Right Of Action

1. As discussed above, the first principle of this Court's inferred-private-right-of-action cases is that, "[l]ike substantive federal law itself, private rights of action to enforce federal law *must be created by Congress.*" *Sandoval*, 532 U.S. at 286 (emphasis added). That principle stems from this Court's recognition "that the federal lawmaking power is vested in the legislative, not the judicial, branch of government." See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981); see *ibid.* ("[F]ederal courts * * * are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers."). Thus, the Court has admonished that, where a "statute that Congress has passed" does not create a cause of action, "courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 287.

2. The cause of action inferred by the Ninth Circuit in this case is completely untethered to the requirement of an unambiguous grant of private rights *by Congress*. The Ninth Circuit concluded that any violation of international law is actionable under its construction of Section 1350 as long as, in the court's view, a customary international law norm has "achieved sufficient consensus to merit application by a domestic tribunal." Pet. App. 10a. There not only is no requirement that a plaintiff point to an Act of Congress that is phrased in explicit "'rights-creating' language," *Sandoval*, 532 U.S. at 288, but, under the court's view, there is no requirement to point to an Act of Congress or treaty ratifying the alleged international norm, much less to an Act of Congress or treaty from which it could be inferred that Congress intended to create a private right of action.

What is more, under the Ninth Circuit's view, a court may enforce a customary international law norm in a suit for damages even when, as here, the political branches have affirmatively *declined* to ratify an international norm or stated that it is *not* self-executing. In other words, the Ninth Circuit did not simply assume the role of a common

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[6] Another example of an Act of Congress that creates a cause of action for a violation of the law of nations is found in 18 U.S.C. 2331, 2333-2334, which was enacted in the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, Tit. X, § 1003(a), 106 Stat. 4522. Among other things, that statute, which contains both criminal and civil remedies, provides that "[a]ny national of the United States injured * * * by reason of an act of international terrorism * * * may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains," plus the costs of maintaining the suit. § 1003(a)(4), 106 Stat. 4522 (18 U.S.C. 2333). In addition, the law expressly defines "international terrorism," § 1003(a)(3), 106 Stat. 4521 (18 U.S.C. 2331(1)), thus delineating the acts that may subject a defendant to liability.

law court and "[r]aise[] up causes of action where a statute has not created them"—a role that, as this Court recently reiterated, is "*not* for federal tribunals." *Sandoval*, 532 U.S. at 287 (emphasis added) (quoting *Lampf, Pleva, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 365 (1991)). Rather, the Ninth Circuit assumed the even more astonishing role of inferring causes of action *in spite of* the countervailing expressions of the political branches in specifically declining to ratify or refusing to make self-executing various sources of international law.

The Ninth Circuit apparently viewed Section 1350 as authorizing this extraordinary exercise of judicial lawmaking. But as explained above, Section 1350 is a jurisdictional provision, not a source of substantive rights—or an extraordinary authorization for judicial lawmaking that somehow could trump even clear expressions of the political branches. Absent the Ninth Circuit's mistaken conception of Section 1350, it is clear that the materials cited by the Ninth Circuit do not, and could not, provide a basis for inferring a private cause of action.[7]

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[7] This Court's jurisprudence applying 42 U.S.C. 1983 underscores this point. This Court has held that Section 1983—which, unlike Section 1350, contains rights-creating language—"provides a cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' by any person acting 'under color of [state law].'" *Gomez* v. *Toledo*, 446 U.S. 635, 638 (1979). In *Gonzaga University* v. *Doe*, *supra*, however, the Court clarified that "[a] court's role in discerning whether personal rights exist in the § 1983 context should * * * not differ from its role in discerning whether personal rights exist in the implied right of action context." 536 U.S. at 285. That is, the Court focuses on the statute allegedly violated and does not accept "anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283. Section 1350 is solely a jurisdictional grant and, therefore, does not supply any cause of action. But it is nonetheless instructive that, even in the Section 1983 context, where a cause of action does exist, a court is not free to infer "actionable" rights in the absence of the unambiguous intent of Congress to confer them.

The Ninth Circuit grounded its finding of an actionable violation of international law on: general provisions of the Universal Declaration of Human Rights, a non-binding resolution of the General Assembly of the United Nations; the American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, to which the Senate refused to give its consent; the ICCPR, a non-self-executing treaty; and language of the *Restatement on Foreign Relations*, a treatise on international law. See Pet. App. 25a-26a & nn.16-18. Significantly, in ratifying the ICCPR (as in ratifying other human rights treaties), the Senate and the Executive Branch expressly agreed that the ICCPR would *not* be self-executing, so that it could not provide individuals with a cause of action in domestic court. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-8071 (1992). Nothing in those provisions remotely supplies a basis for inferring a cause of action.[8]

3. The Ninth Circuit's willingness to rely on customary international law is even more problematic. Customary international law, of course, is not created by Congress. Nor is it even necessarily ratified by the political branches in this

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[8] Other courts of appeals uniformly have recognized that the ICCPR is neither self-executing nor enforceable through jurisdiction-granting provisions such as the habeas corpus statute. See *Flores*, 343 F.3d at 163-164 n.35 (citing cases); *Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001); *United States ex rel. Perez* v. *Warden*, 286 F.3d 1059, 1063 (8th Cir.), cert. denied, 537 U.S. 869 (2002); *Beazley* v. *Johnson*, 242 F.3d 248, 267-268 (5th Cir.), cert. denied, 534 U.S. 945 (2001); *Igartua De La Rosa* v. *United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam), cert. denied, 514 U.S. 1049 (1995); see also *Al Odah*, 321 F.3d at 1147 (Randolph, J., concurring). In addition to the ICCPR, the Senate either expressly conditioned its consent on the proposition, or clearly understood, that the International Convention on the Elimination of All Forms of Racial Discrimination, the Torture Convention, and the Genocide Convention would not be self-executing. See 140 Cong. Rec. 14,326 (1994); 136 Cong. Rec. 36,198 (1990); 132 Cong. Rec. 2350 (1986).

country, which may for a number of reasons wish to decline to commit the Nation to the aspirations, objectives, or obligations expressed therein. Moreover, customary international law is fundamentally different from the statutory text on which this Court has fixed the inquiry in determining whether a private right of action exists. As Judge Cabranes recently observed in *Flores*:

> The determination of what offenses violate customary international law * * * is no simple task. Customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas. Furthermore, the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily identifiable source. All of these characteristics give the body of customary international law a "soft, indeterminate character," Louis Henkin, *International Law: Politics and Values* 29 (1995), that is subject to creative interpretation.

343 F.3d at 154 (footnote omitted); see *id.* at 156-158 (discussing potential sources of customary international law).

The inherently indeterminate nature of customary international law makes it a singularly ill-suited basis for the creation of private rights of action. Nor, even under the Ninth Circuit's view of Section 1350, does the idea of judges searching through unratified treaties and other sources of customary international law documents to discover private rights have anything to recommend it. Indeed, if courts really had such an extraordinary power, then there would be little point in the close scrutiny given to treaties and other international conventions by the Senate and Executive in

determining whether to ratify a treaty or adopt a reservation indicating that a treaty confers no self-executing rights. But the ratification process routinely occurs without apparent recognition that the political branches' judgments could be effectively circumvented by courts applying Section 1350.

Moreover, the Ninth Circuit's asserted power would grant courts carte blanche to create private rights. Not only does the murky nature of customary international law necessitate protracted litigation over the scope and contours of such law, but it means that the determination whether a private right of action exists—under the Ninth Circuit's position—depends on a malleable concept that may vary from one case, or court, to the next. In short, permitting the courts to infer causes of actions from sources of customary international law is likely to lead to uncertainty and unprincipled decision-making—precisely the environment that this Court has sought to eliminate in its recent decisions emphasizing that it has "sworn off the habit of venturing beyond Congress's intent" in deciding when an Act of Congress creates a cause of action. *Sandoval*, 532 U.S. at 287.

4. Nor, especially given this Court's decisions on the role of federal courts since *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), and the text of Article I, § 8, Clause 10 of the Constitution, is there any basis for interpreting Section 1350 as authorizing courts to fashion a federal common law of the law of nations akin to admiralty. Although "[a] narrow exception to the limited lawmaking role of the federal judiciary is found in admiralty," *Northwest Airlines*, 451 U.S. at 95, that role has a textual foundation in the Constitution itself. As the Fourth Circuit recently explained, Article III's reference to "all Cases of admiralty and maritime Jurisdiction" has long been read as authorizing "the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising

admiralty jurisdiction." *R.M.S. Titanic, Inc.* v. *Haver*, 171 F.3d 943, 960 (4th Cir. 2000); see also *United States* v. *Flores*, 289 U.S. 137, 148 (1933) (Section 2 of Article III "has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies"). There is no similar grant of authority in Article III with respect to the law of nations in general. To the contrary, as discussed next, the power to define and legislate offenses against the law of nations is assigned to *Congress* in Article I (§ 8, Cl. 10). See pp. 32-33, *infra*.

Nor, unlike the situation in admiralty, was there a pre-constitutional history of more than 1000 years of specialized courts enforcing international law norms relating to human rights. And nor, again unlike admiralty, is there any robust tradition of federal courts developing and applying the law of nations under Section 1350. In contrast to the volumes of admiralty cases that filled the dockets of the early federal courts, there are, as discussed in Part I.C above, just two reported cases from the founding era in which courts referred to Section 1350 as a potential basis for jurisdiction. Then, from 1795 to 1980, what is now Section 1350 lay fallow. Surely if Congress intended courts to develop an elaborate federal common law—including a cause of action—under Section 1350 for violations of the law of nations, it would have made some comment to that effect when it twice recodified the provision during the past century in the face of such judicial inactivity.

In any event, this Court has admonished that, "[e]ven in admiralty, * * * where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress." 451 U.S. at 96. The Ninth Circuit's decision in this case assumes the authority to infer actionable private rights from sources of customary international law without regard to the "will of Congress." In other words,

even from the perspective of the constitutionally unique harbor of admiralty, the Ninth Circuit's decision is unfounded—indeed, unheard of.

B. Judicial Inference Of A Private Right Directly From Sources Of Customary International Law Is Fundamentally Inconsistent With The Constitution's Separation Of Powers

The Ninth Circuit's conclusion that a court may recognize private rights of action based on customary international law norms directly contravenes settled separation-of-powers principles.

1. As this Court has long recognized, the Constitution commits "the entire control of international relations" to the political branches. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 (1893); see, *e.g.*, U.S. Const. Art. I, § 8, Cls. 3, 10, 11, 12, 13; Art. II, § 2; see also *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."). It is the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" to decide the "important complicated, delicate and manifold problems" of foreign relations. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936); see also *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2386 (2003) ("Nor is there any question generally that there is executive authority to decide what [foreign] policy should be."). In light of the Constitution's textual commitment of the responsibility for international affairs to the political branches, this Court traditionally has cautioned against the exercise of judicial authority that would interfere with that responsibility. Indeed, the Court has acknowledged that foreign policy is "of a kind for which the Judiciary has neither aptitude, facilities nor responsi-

bility." *Chicago & So. Air Lines, Inc.* v. *Waterman S.S Corp.*, 333 U.S. 103, 111 (1948).

2. The Constitution makes explicit which Branch has the authority to "define and punish * * * Offenses against the Law of Nations"—Congress. Art. I, § 8, Cl. 10. The original draft of the Constitution merely gave Congress the authority to punish, and not to define, offenses against the law of nations. During the debate on the Constitution, James Madison and Edmond Randolph "moved to insert, 'define &' before 'punish.'" 2 *The Records of the Federal Convention of 1787*, at 316 (Max Farrand ed., 1911). In so moving, Madison emphasized the need for "uniformity" and "stability in the law" in this area, and proposed that the solution was "to vest the power proposed by the term 'define' in the Natl. legislature." *Ibid.* When the Constitution reached the committee on style, Gouverneur Morris supported a similar revision, emphasizing that "[t]he word *define* is proper when applied to *offences* in this case; the law of (nations) being often too vague and deficient to be a rule." *Id.* at 615.

More than 50 years later, Justice Story recounted the Framers' wisdom in granting that power to Congress. He observed that "[o]ffences against the law of nations are quite * * * important, and cannot with any accuracy be said to be completely ascertained, and defined in any public code, recognised by the common consent of nations." *Commentaries on the Constitution of the United States* § 565, at 407 (Ronald D. Rotunda & John E. Nowak eds. 1987). He added that, "as to offences against the law of nations, there is a peculiar fitness in giving to congress the power to define, as well as to punish," and "there is not the slightest reason to doubt, that this consideration had very great weight with the convention, in producing the phraseology of the clause." *Ibid.*

As Judge Randolph recently observed in recounting the same constitutional history, the "define and punish" clause "makes it abundantly clear that Congress—not the Judiciary—is to determine, through legislation, what international law is and what violations ought to be cognizable in the courts." *Al Odah*, 321 F.3d at 1147 (concurring). Furthermore, the First Congress did not hesitate to exercise that authority. A year after it passed the original version of Section 1350, it codified as part of the first criminal code the three classic offenses against the law of nations identified by Blackstone—piracy, violating the right of safe conduct, and assaults on ambassadors. See An Act for the Punishment of certain Crimes against the United States, 1 Stat. 113-115, 117-118; see also 4 William Blackstone, *Commentaries* *67-*68 ("The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy."). More recently, Congress exercised that same authority in carefully defining the "torture" and "extrajudicial killing" that it expressly made actionable under the TVPA. See S. Rep. No. 249, *supra*, at 5-6 (listing Art. I, § 8, Cl. 10 as one of the constitutional bases for the TVPA).[9]

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[9] Congress has more frequently exercised this authority in the context of defining criminal offenses against the law of nations than in defining privately actionable offenses in the civil context. But the considerations that led the Framers to vest in Congress the authority "to define" the offenses against the law of nations—namely, the indeterminate nature of the law of nations and the need for clarity and uniformity in defining such law—apply to the definition of offenses against the law of nations that may be actionable in a private suit for damages in the United States. Indeed, as explained in Part II.C below, such damages actions may directly interfere with foreign policy objectives and thus squarely implicate the concerns that led the Framers to vest this important power in the Legislature.

Significantly, when Congress focuses its attention on enacting laws that punish or redress violations of the law of nations, it frequently defines the offense or cause of action with precision that is not typically found in customary international law norms. For example, the definitions that Congress adopted in the TVPA—after years of consideration—for "torture" and "extrajudicial killing" are more precise than statements found in provisions of customary international law and track the definitions adopted by the Senate's understanding of the requirements of the Torture Convention (Convention Against Torture And Other Cruel Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20 (1988), 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985)), which the Senate adopted as a condition to the Senate's consent to that treaty. Similarly, in the Genocide Convention Implementation Act of 1987, Congress made genocide a federal criminal offense. 18 U.S.C. 1091-1092. In doing so, however, it explicitly defined the offense, 18 U.S.C. 1091(a), and carefully limited it by specifying, *inter alia*, that it applies only to acts committed within the United States or by United States nationals, 18 U.S.C. 1091(d), and that it does not "creat[e] any substantive or procedural right enforceable by law by any party in any proceeding," 18 U.S.C. 1092.

Nor do statements in pre-*Erie* decisions of this Court, concerning the interrelationship between international law and the law of this country, support the Ninth Circuit's radically different view of the role of the courts in these same types of matters in suits brought under Section 1350. In *The Paquete Habana*, 175 U.S. 677 (1900), this Court observed that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700.[10] See also, *e.g.*, *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820) (piracy action). But *The Paquete Habana* Court's observation does not address the question of when questions of international law are, in fact, "duly presented." The Ninth Circuit's conception that Section 1350 duly presents questions of international law by making any violation of customary international law actionable is profoundly flawed and would routinely generate the potential for judicial pronouncements at odds with the policies of the political branches on matters of foreign policy, which courts seek to avoid.[11]

Equally important, the statement quoted above from *The Paquete Habana* was immediately followed by language indicating that a court may properly look to international law norms only where there is "no controlling executive or legislative act." 175 U.S. at 700. A ratified treaty accompanied by an express declaration that it is not self-executing is plainly such a controlling act. So too, the existence of a treaty or convention that has been ratified by some nations and even signed by the United States (but not yet ratified) falls in the same category. And U.N. General Assembly resolutions are not binding on member nations,

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[10] *The Paquete Habana* involved an appeal from an order condemning two fishing vessels and their cargoes as prizes of war, i.e., a classic type of proceeding within the "admiralty and maritime jurisdiction" of the federal courts. 175 U.S. at 680. After examining sources of customary international law, the Court concluded that fishing vessels generally "are exempt from capture as prize of war," and thus held that the vessels' capture was without cause. *Id.* at 708, 714.

[11] The precise status of *The Paquete Habana*'s statement after *Erie* is a subject of considerable debate. See *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1153 n.4 (7th Cir. 2001) (summarizing debate). But however that debate is ultimately resolved, nothing in the decision supports either the Ninth Circuit's interpretation of Section 1350 as something other than a jurisdictional grant or the practice of inferring private causes of action directly from customary international law.

and require further action by the member states before they can create any enforceable rights. In short, the decision below effectively undermines the critical role of the political branches in determining the extent to which international law has "controlling" effect in this country.[12]

3. The Constitution also establishes special procedures for the consideration and ratification—by the political branches—of treaties. See U.S. Const. Art. II, § 2, Cl. 2. As this Court has held, a non-self-executing treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C. J.). Moreover, even when a treaty is self-executing, it does not typically confer a private right of action; rather, it means only that it is "regarded in courts of justice as equivalent to an act of the legislature." *Ibid.*

The constitutionally prescribed process for ratifying treaties ensures that the political branches scrutinize the United States' international obligations or declarations before committing to them. Since World War II, numerous international human rights treaties have been proposed and assented to by other nations. The political branches of the United States Government have declined to ratify several of these treaties, such as American Convention on Human Rights, that were relied on by the Ninth Circuit in this case. Pet. App. 26a & n.17. Even when they have chosen to ratify

[12] That does not mean that international law can play no role in adjudicating disputes that are otherwise properly pending in federal court pursuant to an Act of Congress that creates a cause of action. When such an issue is "duly presented," a court may properly consult international law. But such reference to international law is a fundamentally different endeavor than inferring a cause of action in the first instance based solely on a court's assessment of customary principles of international law. The former is a judicial task. The latter is one that the Constitution unambiguously vests in the political branches.

such instruments, the President and the Senate have frequently conditioned ratification on express reservations, understandings, or declarations that, *inter alia*, specify that the treaties are not self-executing under domestic law and, therefore, do not create privately enforceable rights. For example, as noted above, when the Senate consented to the Torture Convention in 1990, it did so only after attaching a number of conditions to its ratification, including those specifying that the substantive provisions of the Convention were "not self-executing." See S. Exec. Rep. No. 30, 101st Cong., 2d Sess. 30-31 (1990). Similarly, in ratifying the ICCPR, the Senate and the Executive stated that the ICCPR is not self-executing. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-8071 (1992). The political branches took those actions without any apparent understanding—let alone recognition—that Section 1350 could be read as a basis for overriding those carefully considered judgments. That omission reflects the true nature of Section 1350 as a jurisdictional grant, rather than a massive oversight on the part of the political branches.

The Senate and the President do not always specify their reasons for stating that international conventions do not give rise to privately enforceable rights. However, myriad factors are properly considered by the political branches in deciding whether to express such reservations or conditions on the United States' ratification of an international agreement. They include the possibility of embarrassment to allies in actions filed in our courts, the potential for friction with other nations that the United States is seeking to influence through diplomatic means, and the negative consequences for the United States and its officials if they were subjected to reciprocal suits in foreign courts. The Ninth Circuit's decision provides the courts with an ill-defined power to override those policy judgments, even though the

courts have no responsibility or capability to judge the impact that their actions may have on other foreign policy objectives.

The political branches could reasonably conclude, for example, that injuries to United States citizens abroad should be resolved through diplomatic channels, in which executive branch officials can seek redress consistent with broader foreign policy objectives, rather than through litigation. The Ninth Circuit approach creates the same potential for friction through suits filed by aliens in United States courts. Indeed, the Ninth Circuit would provide aliens vastly superior rights to sue for damages for alleged violations of the law of nations than are available to United States citizens—in the United States' own courts. See *Al Odah*, 321 F.3d at 1146 (Randolph, J, concurring). But if the executive branch can limit the litigation rights of citizens to promote foreign policy objectives, it would seem to follow *a fortiori* that the rights of aliens in our courts can be limited, unless and until the political branches authorize a particular cause of action.

4. The role that the Ninth Circuit assumed for the courts in applying Section 1350 in this case is fundamentally incompatible with the constitutional commitment of those powers to the political branches. The Ninth Circuit's position transforms Section 1350 into a roving license for the Federal Judiciary to define the offenses against the law of nations that are actionable in this country in a manner that is *not* anchored in the positive enactments of the political branches of the United States Government—and, indeed, as the Ninth Circuit's decision in this case demonstrates (see Pet. App. 25a-26a), may actually *contradict* those enactments. The Ninth Circuit's decision accordingly transgresses fundamental and textually committed separation-of-powers principles.

To permit Article III courts, in the absence of a governing Act of Congress, to discover private rights of action in the vagaries of customary international law also is anti-democratic, just as it would be to permit Article III courts to raise up causes of action from sources of domestic law when Congress has not conferred them. See *Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring). By contrast, the political branches are directly accountable to the people for foreign policy decisions made on their watch. Moreover, as John Jay explained in *The Federalist No. 64* in discussing the treaty power, one of the reasons that the Constitution vests that power in the Executive and the Senate, *i.e.*, in the political branches, is that electors are likely to choose the President and Senators "who best understand our national interests," "who are best able to promote those interests, and whose reputation for integrity inspires and merits confidence." See also Pet. App. 96a (O'Scannlain, J., dissenting) (political branches, unlike courts, "may be held accountable for any whirlwind that they, and the nation, may reap because of their actions").

Although the political branches cannot control the development of customary international law, they can seek to influence the development of that law through diplomatic and military measures, formal pronouncements, negotiation of international agreements, and the announcement of reservations or conditions to the ratification of such agreements, or to general standards of international law that may be asserted by other nations. Both the President and the Congress are held directly accountable through the political processes for the treaties that they ratify and the legislation that they enact, such as the TVPA, defining or providing for the private enforcement of specific offenses against the law of nations. By contrast, as Judge Randolph recently observed, "[t]o have federal courts discover [customary international law] among the writings of those considered

experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Al Odah*, 321 F.3d at 1148 (concurring).

C. The Litigation Under Section 1350 That Has Proliferated In The Federal Courts In The Past Two Decades Underscores The Gravity Of Those Separation-Of-Powers Problems

In more practical terms, the Section 1350-driven litigation that has spread in the federal courts since *Filartiga* illustrates the manner—and extent—to which permitting courts to recognize private rights of action based on their own assessment of customary international law is incompatible with the textual commitment of the control over international relations to the political branches. Indeed, the majority below itself acknowledged that "international human rights litigation under [Section 1350] inevitably raises issues implicating foreign relations," Pet. App. 18a, and that this case itself "raises difficult and politically sensitive issues connected to our foreign relations," *id.* at 14a n.7; see also *id.* at 3a (This litigation "implicates our country's relations with Mexico."). The state of affairs in the wake of *Filartiga* demonstrates the magnitude of the error in construing Section 1350 (or U.N. declarations) as creating a cause of action for damages for violating judicially-defined standards of international law.

1. In numerous cases, the assertion of claims under Section 1350 in the aftermath of *Filartiga* has directly embroiled United States courts in difficult and politically sensitive disputes that, in many instances, are confined to foreign nations. *Filartiga* itself involved a suit brought by Paraguayans alleging torture by Paraguayan officials in Paraguay. Since then, suits under Section 1350 have called on the federal courts to entertain suits based on an alleged terrorist attack by the Palestine Liberation Organization on

a bus in Israel, *Tel-Oren*, 726 F.2d at 775; Argentina's destruction of an oil tanker during the Falklands War, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); genocide and war crimes in connection with the conflict in Bosnia, *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); environmental pollution by a U.S. mining company in Peru, *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); and war crimes by the Japanese against Japanese and Korean comfort women during World War II, *Hwang Geum Joo* v. *Japan*, 332 F.3d 679, 687 (D.C. Cir. 2003).[13] Although

[13] See also, *e.g.*, *Bano* v. *Union Carbide*, 273 F.3d 120, 127-130 (2d Cir. 2001) (suit by victims of an accident at a chemical plant in India against the U.S. owner of the plant; Section 1350 claims barred by Indian judicial settlement orders); *Bigio* v. *Coca-Cola Co.*, 239 F.3d 440, 447-449 (2d Cir. 2001) (suit by Canadian citizens and their Egyptian corporation against Delaware corporations alleging that the defendants purchased property unlawfully seized from the plaintiffs by the Egyptian government because the individual plaintiffs were Jewish; Section 1350 claim rejected because the complaint did not allege violations of the law of nations by the defendant corporations); *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-108 (2d Cir. 2000) (suit by Nigerian citizens against two foreign companies alleging that the companies participated in human rights abuses against the Nigerians; case remanded for further consideration of forum non conveniens motion), cert. denied, 532 U.S. 941 (2001); *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 164-169 (5th Cir. 1999) (suit by Indonesian citizens against Indonesian corporations for environmental abuses, human rights violations, and genocide; Section 1350 claim rejected because allegations did not rise to the level of violations of the law of nations); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) (class action by Philippine citizens against former President Marcos and his family; Section 1350 claims allowed to proceed), cert. denied, 513 U.S. 1126 (1995); *Koohi* v. *United States*, 976 F.2d 1328, 1333 n.4 (9th Cir. 1992) (suit by families of those onboard a civilian aircraft erroneously shot down by a U.S. warship; Section 1350 claims dismissed because it does not waive sovereign immunity), cert. denied, 508 U.S. 960 (1993); *Goldstar (Panama) S.A.* v. *United States*, 967 F.2d 965, 967-969 (4th Cir. 1992) (suit for damages stemming from looting, allegedly caused

many actions under Section 1350 are dismissed prior to trial on various grounds, such as foreign sovereign immunity, the mere filing of such litigation can raise serious international relations issues and difficulties for the governments of the foreign countries or officials involved in such suits, as well as the United States Government. The State Department has received numerous protests about these actions from foreign governments.

Some suits are filed against corporations or individuals who allegedly aided and abetted the unlawful acts of foreign governments. In those cases, the legality of the alleged conduct of a foreign government may be adjudicated even though that government is not represented in the litigation. In other cases, the suit is filed directly against a foreign government or its officials with little prospect of recovering (or enforcing) any judgment in light of sovereign immunity principles. A primary motivation for filing such suits appears to be simply to obtain a public judicial forum in the United States to air international human rights grievances to the world.

Section 1350 litigation may implicate and inflame international tensions or disagreements over highly sensitive matters in several different respects. First, courts may be required to resolve factual disputes over the responsibility for alleged human rights abuses, a task complicated by the

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by the lack of U.S. police protection in the wake of the U.S. invasion of Panama; Section 1350 claim rejected because Section 1350 does not waive sovereign immunity); *Saltany* v. *Reagan*, 886 F.2d 438 (D.C. Cir. 1989) (per curiam) (suit by Libyan citizens for damages caused by the 1986 U.S. air strikes on Libya; claims summarily dismissed); *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 206-208 (D.C. Cir. 1985) (Scalia, J.) (suit by Nicaraguan citizens and residents, among others, against U.S. officials and alleged paramilitary trainers for tortious injuries caused by the Contras; Section 1350 claim rejected on the grounds that Section 1350 does not reach private, non-state conduct, and that even if it applied to state conduct, a suit was precluded by sovereign immunity).

fact that most Section 1350 actions involve events that allegedly occurred in foreign countries. Second, the entry of judgment (or even dismissal of actions) may create the impression to the citizens of other nations—who are not familiar with the American constitutional system or Section 1350—that the United States Government has taken sides in an internal dispute, even where the Executive Branch has not spoken directly on a question. Third, and perhaps most fundamentally, in resolving such disputes, federal courts have construed and made pronouncements on the consensus that has developed with respect to particular international agreements or the scope and application of those agreements.

Each of these scenarios may frustrate if not displace the efforts of the political branches to address international events or foreign policy issues by speaking with *one* voice, and to define the scope of international rights or obligations through legislation, treaties, or less formal agreements. Indeed, Judge Gould believed that the potential for interfere with matters assigned to the political branches that is created by the Ninth Circuit's application of Section 1350 is so great as to trigger the political question doctrine. See Pet. App. 97a-108a (dissenting).

2. The potentially disruptive effects of Section 1350 litigation on the foreign policy interests of the United States and the actions of other countries is exemplified by the pending Section 1350 action in *In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (Jud. Pan. Mult. Lit. 2002), which was brought on behalf of alleged victims of apartheid. The Government of South Africa, at the highest levels, has informed the United States Government, as well as the federal court overseeing this action (see Pet. 18; U.S. Pet. Br. 25-26 n.9), that the litigation threatens to disrupt and contradict the laws, policies, and domestic processes that South Africa has developed—with the popular backing of its

people—for dealing with the aftermath of apartheid as an institution. The current Government of South Africa has taken extensive steps to promote reconciliation and redress for the injustices of apartheid, and support for those efforts is a cornerstone of the United States' foreign policy with respect to South Africa.

The State Department has determined that, to the extent that the pending apartheid litigation impedes South Africa's domestic efforts to promote both reconciliation and equitable economic growth, the litigation will undermine the United States foreign policy objectives of promoting both foreign investment in South Africa and redress for the wrongs of apartheid. Several foreign governments, including the governments of the United Kingdom and Canada, have approached the United States Government through diplomatic channels to express their concerns about suits in which their banks, corporations, and other entities have been named as defendants. The State Department has received similar complaints from foreign governments in other recent Section 1350 cases.

In other situations, the prospect of costly litigation under Section 1350 and potential liability in United States courts for operating in a country whose government implements oppressive policies—policies that the United States Government is seeking to change through diplomatic channels or political sanctions—may discourage U.S. and foreign corporations from investing in precisely the areas of the world where economic development may have the most positive impact on economic and political conditions. Economic measures, such as promoting investment or the threat of sanctions, are an important tool that the Executive uses in conducting the Nation's foreign policy. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 375-376 (2000) (recounting the manner in which the political branches

have sought "to exercise economic leverage against [the military government of] Burma").[14]

3. Furthermore, as conceived by courts such as the Ninth Circuit, Section 1350 is not limited to suits against rogues and outlaws. It may be invoked by aliens as a means of obtaining judicial review of the Executive's efforts to enforce this Nation's criminal laws with the assistance of other nations, as in this case, or the Executive's conduct of military operations in which foreign allies may be involved, including the current war on terrorism. For example, the next-friend petitioners in *Al Odah* v. *United States*, *supra*, included a claim under Section 1350 alleging that the military's detention of aliens at the U.S. Naval Base at Guantanamo Bay, Cuba, violated the law of nations and treaties entered into by the United States, including the Geneva Convention. Although, as Judge Randolph explained in his concurring opinion in *Al Odah*, 321 F.3d at 1149-1150, the United States and its officials are immune from suit under Section 1350, Section 1350 may still be asserted against foreign governments or officials who assist the United States military in its ongoing operations around the world.[15]

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[14] Burma (Myanmar) is a prime example of a country in which the United States Government is actively seeking through diplomatic channels, congressional measures, and economic sanctions to promote positive political and economic change. See Pet. App. 229a & n.1. One U.S. corporation that was involved in the construction of a pipeline in Burma is currently the subject of a Section 1350 action pending in the Ninth Circuit. See *Doe* I v. *Unocal Corporation*, Nos. 00-56603 & 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003), vacated and rehearing granted (argued June 11, 2003). The *Unocal* case illustrates that the expansive interpretation of Section 1350 adopted by courts such as the Ninth Circuit may also subject U.S. companies to Section 1350 litigation if they invest or engage in foreign projects.

[15] Another example is *Doe* v. *ExxonMobil Corp.*, No. 01CV1357 (D.D.C. 2002). That case involves an action brought under Section 1350 challenging alleged human rights abuses by military and police forces of

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A decade after Section 1350's predecessor was enacted by the First Congress, then-Representative John Marshall observed that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 6 Annals of Cong. 613 (1800), quoted in *Curtiss-Wright Export Corp.*, 299 U.S. at 319. The revolutionary role assumed by federal courts since *Filartiga* to serve as arbiters of the types of wide-ranging international disputes discussed above—typically involving, as here, events arising in foreign lands—was not within the comprehension of those who heard Marshall's remarks that day.

III. NO CAUSE OF ACTION MAY BE INFERRED FROM SECTION 1350 BASED ON THE ALLEGED CONDUCT OF ALIENS IN FOREIGN COUNTRIES

The cause of action described and applied by the Ninth Circuit in this case is improper in another fundamental respect. Like the other courts of appeals that have concluded that Section 1350 itself creates a cause of action, the Ninth Circuit has concluded that it reaches a tort committed against an alien *anywhere* in the world. That understanding, too, is seriously mistaken.

1. The longstanding presumption is that, unless an expression to the contrary is found within a federal statute, or absent certain contexts where special considerations exist,

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the Government of Indonesia. In July 2002, the State Department submitted a letter to the court in that case (see Pet. App. 251a-252a), advising the court of the "potentially serious adverse impact [of that litigation] on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism" in Indonesia, a country that has served as "a focal point for U.S. initiatives in the ongoing war against Al Qaida and other dangerous terrorist organizations." *Id.* at 251a-252a (Letter of William H. Taft, IV, Legal Adviser, to Hon. Louis F. Oberdorfer (July 29, 2002)).

see, *e.g.*, *United States* v. *Bowman*, 260 U.S. 94 (1922), the statute is presumed to regulate private conduct only within the territory of the United States, or, in limited circumstances, on the high seas. See *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284-285 (1949); see also *Rose* v. *Himely*, 8 U.S. (4 Cranch) 241, 279 (1808) (general statutory language should not be construed to apply to conduct of foreign nationals outside the United States).

That presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). And the newly formed federal courts were, if anything, particularly sensitive to avoiding such clashes. As Justice Story observed in *United States* v. *The La Jeune Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (No. 15,551):

> No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns. If a nation were to violate as to its own subjects in its domestic regulation the clearest principles of public law, I do not know, that that law has ever held them amenable to the tribunals of other nations for such conduct. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.

See also *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 630-631 (1818) (federal piracy statute should not be read to apply to foreign nationals on a foreign ship); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (presumption

against extraterritorial application "has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility").

If the Ninth Circuit had insisted on the existence of an Act of Congress that conferred a private right of action, it could then have applied the presumption against extraterritoriality to that statute. To the extent that such a statute included language overcoming the presumption, it might have provided specific direction to minimize the potential for friction in such extraterritorial application, such as the exhaustion provision of the TVPA. See p. 21, *supra*. But instead, the Ninth Circuit inferred a cause of action from the jurisdiction-conferring terms of Section 1350 and thus essentially bypassed the presumption against extraterritoriality.

2. Nothing in Section 1350, or in its contemporary history, suggests that Congress contemplated that suits would be brought based on conduct against aliens in foreign lands. To the contrary, the only reported cases in which courts even adverted to Section 1350's predecessor soon after its enactment involved events that took place in this country's territory—*i.e.*, the capture of a foreign ship in United States territorial waters and seizure of slaves on a ship at a United States port. See Part I.B, *supra*.

More generally, the founding generation, in particular, exhibited little enthusiasm for inserting itself into the internal affairs of *other* countries. See 35 *The Writings of George Washington from the Original Manuscript Sources 1745-1799* (John C. Fitzpatrick, ed. 1940), Letter of George Washington to James Monroe, Aug. 25, 1796 ("[N]o Nation had a right to intermeddle in the internal concerns of another.") (available at http://memory.loc.gov/ammem/gwhtml/gwhome.html). The evidence suggests, moreover, that "those who drafted the Constitution and the Judiciary

Act of 1789 wanted to open federal courts to aliens for the purpose of *avoiding*, not provoking, conflicts with other nations." *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring); see *The Federalist No. 3* (John Jay) ("It is of high importance to the *peace* of America that she observe the law of nations * * * and * * * it appears evident, that this will be more perfectly and punctually done by one national Government.") (emphasis added). By authorizing actions under Section 1350 challenging alleged abuses against aliens by foreign actors in foreign lands, courts have transformed Section 1350 into an instrument for generating international discord and intermeddling in the affairs of other countries.

3. In this case, the Ninth Circuit recognized a cause of action under Section 1350 for the arrest of a Mexican national by Mexican civilians in Mexico. Although it is true that Alvarez-Machain was arrested at the behest of United States law enforcement officials, that does not alter the extraterritorial nature of the arrest. Indeed, it is precisely the extraterritorial nature of the arrest that rendered it actionably "false" and "arbitrary" in violation of international law in the Ninth Circuit's view.[16] Moreover, the

[16] For the reasons explained in the Brief for the United States in No. 03-485, the extraterritorial arrest at issue was authorized by federal law and was, therefore, in no way arbitrary or in violation of the law of nations. The Ninth Circuit would not have had to reach that question in determining whether Sosa had stated an actionable claim under Section 1350, if it had recognized at the outset that Section 1350 is purely a jurisdictional grant, and that federal courts may not infer private rights from the law of nations, whatever its precise scope. In addition, in view of the separation-of-powers problems and practical concerns created by the interpretation of Section 1350 by the Ninth Circuit and other courts of appeals in the wake of *Filartiga*, the United States believes it is important for this Court to correct the threshold errors made by the Ninth Circuit in analyzing Alavarez-Machain's Section 1350 claim. In any event, because of the Ninth Circuit's erroneous interpretation of federal law, even if every mistaken antecedent step in the Ninth Circuit's application of Section 1350 were indulged, the decision would still need to be reversed.

claim held actionable by the Ninth Circuit was directed solely at a Mexican national, and with respect to events occurring in Mexico. The extraterritorial nature of the events at issue in this case only heightens the separation-of-powers concerns discussed above, and it provides an additional reason for the Court to hold that the Ninth Circuit erred in affirming the judgment against Sosa based on Alaverez-Machain's Section 1350 claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JOSE FRANCISCO SOSA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN, et al.,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Alien Tort Claims Act ("ATCA"), is only a grant of jurisdiction, or whether it authorizes the federal courts to hear and decide claims made by aliens for torts committed in violation of the law of nations.

2. Whether the actions authorized by the ATCA are limited to suits for violations of *jus cogens* norms of international law.

3. Whether Dr. Alvarez' abduction constitutes a tort in violation of the law of nations actionable under the ATCA.

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OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. 1a-108a) is reported at 331 F. 3d 604. The panel decision of the court of appeals (Pet. App. 109a-139a) is reported at 266 F. 3d 1045. The district court's orders of March 18, 1999 (Pet. App. 176a-219a) and May 18, 1999 (Pet. App. 172a-175a), and its judgment of September 9, 1999, (Pet. App. 140a-171a) are unreported.

JURISDICTION

This Court has jurisdiction based upon 28 U.S.C. § 1254(1) (2000).

STATEMENT OF THE CASE

Petitioner Francisco Sosa was one of several Mexican nationals who forcibly kidnapped Respondent Dr. Humberto Alvarez-Machain from his medical office in Guadalajara, Mexico, on April 2, 1990, held him *incommunicado*, and transported him to El Paso, Texas. What "authorization" there was for this illegal operation came from the Deputy Administrator of the Drug Enforcement Administration ("DEA") – not from the President of the United States, nor the Attorney General, nor the Secretary of State, nor any other member of the cabinet. According to his own sworn testimony, not even then-DEA Administrator Jack Lawn was aware of the operation, 331 F. 3d at 642, n 1. The motivation for the operation was the extraterritorial enforcement of U.S. criminal law – not the neutralization of a terrorist threat or any other national security concern.

Despite Mexico's formal protest,[1] this Court ruled that Respondent's kidnapping did not violate the terms of the extradition treaty between the United States and Mexico, *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992). In November 1992, Dr. Alvarez went to trial in United States District Court in Los Angeles before Judge Edward Rafeedie. On December 14, 1992, Judge Rafeedie, who sentenced other defendants to life in prison for their roles in the death of Agent Camarena, directed a verdict of acquittal,[2] emphasizing that the prosecution of Dr. Alvarez was based on "wild speculation" and "hunches" that did not add up to sufficient evidence of Respondent's participation in the crime. Petitioner and the government *amicus curiae* now stress the brutality of Camarena's death in order to deprive Respondent of even a modest civil remedy for the wrongs he suffered at Sosa's hands.

Invoking the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) ("ATCA," "Act," or "Section 1350"),[3] a short and unambiguous provision of the First Judiciary Act of 1789, Dr. Alvarez sued Sosa and others "for a tort only committed in violation of the law of nations or a treaty of the United States." It has been conceded that Sosa acted under color of official authority, *United States v. Caro-Quintero*, 745 F. Supp. 599, 609 (C.D. Cal. 1990), but his motion to have the United States substituted as defendant under the Westfall Act, 28 U.S.C. §2679 (2000), was denied. Sosa did not appeal that disposition, and it is not before this Court. [4]

Although the facts concerning Dr. Alvarez's treatment during the abduction were disputed at trial, it is not disputed that he was taken from his medical office, driven away in an unmarked car, held against his will in a motel in another town, not allowed to contact his family until after he was finally turned over to waiting DEA agents in Texas the following day. The district judge did not find Dr. Alvarez' testimony about his physical treatment credible but awarded him $25,000.00 in damages because there was no doubt that he had suffered emotional distress as the result of Sosa's actions.[5] A panel of the Court of Appeals affirmed, *Alvarez-Machain v. United States* 266 F.3d 1045, 1064 (9th Cir. 2001) and the *en banc* panel affirmed, *Alvarez-Machain v. United States* 331 F.3d 604, 641 (9th Cir. 2003) (*en banc*), finding that Dr. Alvarez' right to be free of arbitrary arrest and detention had been violated.

SUMMARY OF ARGUMENT

This Court is confronted with two competing views of the alien tort claims provision of the First Judiciary Act of 1789, and two competing views of the status of the law of

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[1] *Brief for the United Mexican States as Amicus Curiae in Support of Affirmance, reprinted in* 31 I.L.M. 934 (1992).

[2] *Alvarez-Machain v. Sosa*, 331 F. 3d 604, 610 (9th Cir. 2003) (*en banc*).

[3] The ATCA is sometimes referred to as the "Alien Tort Statute" or the "Alien Tort Act." In this brief, Respondent uses the title and acronym employed by the vast majority of courts, including the *en banc* court below.

[4] The United States was substituted as a defendant for all of the other individual defendants, and the *en banc* decision below ruled that federal officers and the United States can only be sued for torts in violation of the law of nations under the Federal Tort Claims Act. *Alvarez-Machain*, 331 F.3d at 631.

[5] Though Respondent strongly disagrees with the district court's evaluation of the facts of this case and of his credibility and testimony, he recognizes that under the rules governing the District Court's findings he is not in a position to challenge them on appeal.

nations and the power of low-level executive employees to violate it. Dr. Alvarez relies on the plain words of the ATCA and the overwhelming historical evidence that the First Congress intended the federal courts to hear and decide claims of "torts committed in violation of the law of nations." This view has been adopted by every lower federal court to consider the issue.

Petitioner Sosa and his *amici* ask this Court to adopt an interpretation of the ATCA which renders it meaningless from its inception and which is at odds with the plain words of the statute and the overwhelming weight of the historical evidence. Sosa contends that the ATCA threatens the prosecution of the war against terrorism and American business interests. There is simply no evidence to support this extreme position. The ATCA has often provided a forum for victims of egregious human rights violations, but the ATCA does nothing to undermine our national or economic security. Instead, the ATCA has been a beacon to the world and reflects a commitment to the rule of law from the Founders to a time in which respect for fundamental rights has become a matter of profound international concern.

1. Though Petitioner repeatedly finds it "inconceivable" that the First Congress would have authorized the federal courts to enforce the law of nations in so many words, *Pet. Brf.* at 16, the uniform decisions of the lower courts that the ATCA means what it says are fully in keeping with the ATCA's history and Congressional intent. Indeed, not a single member of the *en banc* panel below, *including the five dissenters*, accepted Petitioner's argument, opting instead for an interpretation that is (a) faithful to the plain language of the ATCA by preserving the meaning of every word in the statute and not just one; (b) consistent with the understanding of the First Congress and early judicial and Executive interpretations of the act and confirmed by Congress in 1991 when it adopted the Torture

Victim Protection Act ("TVPA"); (c) consistent with this Court's long-standing precedents on the status of international law as law of the United States; and (d) consistent with the separation of powers in a way that Petitioner's effort to have the judiciary rewrite the statute is not. The *en banc* court's interpretation of the ATCA is consistent with the *unanimous* disposition of the issue before this Court by lower courts across the country for the last twenty-four years.

Sosa's version of the ATCA's history, on the other hand, disregards the transitory tort doctrine, well-established in English and American law in 1789 and well-understood by the framers of the Act as vitiating any concern that the exercise of jurisdiction necessarily involves some extraterritorial or "universal" application of U.S. law.

2. The ATCA does not allow claims based upon norms the United States does not accept, as Petitioner asserts. In his Petition for Certiorari, Petitioner urged the Court to limit the category of actionable claims under the ATCA to violations of *jus cogens*. Petitioner now abandons that argument, apparently convinced that nothing in this Court's precedents or in decisions under the ATCA requires a customary norm to qualify as *jus cogens* in order to be justiciable. To the contrary, a *jus cogens* violation may be logically *sufficient* to satisfy the ATCA but it cannot be *necessary*, as the courts below have ruled. In reframing the issue now, Petitioner asserts what no party denies, namely that the courts will not find a violation of the law of nations or a treaty of the United States if the Executive branch has opted out of some customary norm. But it does not follow that every agent of the Executive branch has that power and therefore enjoys some prophylactic immunity from all ATCA cases simply by violating the law of nations.

3. In order to suggest that Dr. Alvarez' treatment was not a violation of the law of nations, Petitioner offers an antiseptic version of the kidnapping. However, it is undisputed

that Sosa had no legal authority to arrest or abduct Dr. Alvarez-Machain under Mexican, United States, or international law. The right to be free of unlawful seizure has an ancient pedigree and is fundamental to the modern evolution of human rights law, traceable to the Nuremberg trials after World War II and the critical support of the United States over the decades since that time. The government has repeatedly drawn on these principles in its foreign policy and in litigation before the International Court of Justice.

This case does not involve any question of corporate liability under the ATCA, despite the submission of corporate *amici* supporting Petitioner. Nor does it involve any challenge to the President's authority to combat terrorism at home and abroad, despite the *amicus curiae* brief submitted by the United States.

This case challenges, in the limited context of a suit for money damages, only the legal authority of low-level DEA agents to hire bounty hunters, without high-level government authorization, in violation of Congressional restrictions on such conduct,[6] to abduct a Mexican national in Mexican territory and force him into this country to be tried for a crime that occurred in Mexico, all over the protest of the Mexican government. Surely if the facts of this case were reversed and a U.S. citizen were kidnapped by Mexican agents in a criminal case, the government of the United States would insist on a more faithful adherence to the rule of law.

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[6] These restrictions are discussed in detail in Respondent's Brief in *United States v. Alvarez-Machain*, No 03-485.

ARGUMENT

I. THE ALIEN TORT CLAIMS ACT REQUIRES NO FURTHER LEGISLATION TO PROVIDE A FEDERAL FORUM FOR TORTIOUS VIOLATIONS OF INTERNATIONAL LAW.

A. Petitioner's Interpretation of the ATCA Is Inconsistent with the Plain Language of the Statute and Renders All But One Word Of It Meaningless.

The Alien Tort Claims Act provides: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[7] 28 U.S.C. § 1350. For over two centuries, the ATCA has been applied rarely but always consistently with the interpretation that it authorizes the federal courts to hear and resolve claims of tortious violations of the law of nations without further Congressional action. In recent years, reflecting modern developments in international human rights law, the ATCA has been employed to redress well-defined human rights violations such as the right to be free from torture and genocide. Since 1984, defendants have

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[7] The original version of the Alien Tort Claims Act in the First Judiciary Act provided in relevant part that the district courts shall "have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. Until the early 20th century, the term "law of nations" – now supplanted by the term "customary international law" – was used to denote the customary rules and obligations that regulated interactions between states and certain aspects of state interactions with individuals. *Restatement (Third) of the Foreign Relations Law of the United States* § 111 Introductory Note (1987) ("*Restatement (Third)*").

argued that an express cause of action should be required for suits under the ATCA,[8] but every court to address this issue has rejected it,[9] establishing a consistent body of law. In this very case, not a single one of the eleven judges below, *including the five dissenters,* adopted Sosa's analysis.

The dominant reason for this extraordinary uniformity is that Petitioner's argument is inconsistent with the plain

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[8] Only two circuit judges, writing only for themselves in cases separated by twenty years, have accepted this argument. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *Al-Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003) (Randolph, J., concurring).

[9] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-06 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Trajano v. Marcos*, 978 F.2d 493, 503 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002); *Presbyterian Church of Sudan v. Talisman Energy*, 244 F.Supp. 2d 289, 320 (S.D.N.Y. 2003); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999); *Estate of Lacarno Rodriguez v. Drummond*, 256 F. Supp.2d 1250, 1258 (N.D. Ala. 2003) *Cabello v. Fernandez-Larios*, 157 F.Supp.2d 1345, 1365 (S.D. Fla. 2001); *Iwanowa v. Ford Motor Company*, 67 F.Supp.2d 424 (D.N.J. 1999); *Jama v. I.N.S.*, 22 F. Supp. 2d 353, 362-63 (D.N.J. 1998); *Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 7 (D.D.C. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D.Fla. 1993); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988). Petitioner neither cites not distinguishes this uniform body of principle, adopted over the last twenty years by the Second, Fifth, Ninth, and Eleventh circuit courts of appeals and numerous district courts across the country. *See Amicus* Brief of National and Foreign Scholars, § I.

language of the ATCA. By its terms, the statute establishes jurisdiction over (i) "any civil action" (originally "all causes") (ii) by an "alien" plaintiff, (iii) suing for a "tort only," (iv) "in violation of" international law in either customary or treaty form. This language is neither complicated nor ambiguous. So long as the plaintiff is not a citizen of the United States, the statute is satisfied if the underlying wrong takes tortious form and is in violation of international law. *See Caminetti v. United States*, 242 U.S. 470, 490 (1917) ("If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.").

Petitioner's narrow focus on the word "jurisdiction" as though it fully resolved the issue before the Court, *Pet. Brf.* at 10, treats the other words in the statute as if they bear neither meaning nor relevance. This Court has never endorsed so cavalier an approach to the language of a statute.[10]

Congress had and has the power to provide additional statutory causes of action for violations of the law of nations (and did so in the TVPA), Petitioner's suggestion that it *must* do so before Section 1350 can be satisfied invites the Court to rewrite the ATCA. Nothing in the statute explicitly or implicitly requires any additional implementing act. The eighteenth-century lawyers who drafted the statute fully understood both the remedial consequences of "torts" – even in

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[10] *See Alaska Dept. of Env. Conservation v. E.P.A.*, 124 S. Ct. 983, 1002 n 13 (2004) ("It is . . . 'a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

the absence of statutory definition or implementation – and the place of the "law of nations" within American law.[11]

1. "***A tort only.***" Petitioner argues that tort law was in a "nascent" or "infant" state in 1789 and did not fully evolve until the nineteenth century with the publication of some treatises on the subject. *Pet. Brf.* at 7, 24 *et seq*. But it was not some miracle of foresight that enabled Congress to use the word "tort" in the statute. Lawyers of the time, including the draftsman of the First Judiciary Act, Oliver Ellsworth, fully understood that "tort" referred to a variety of civil wrongs that were distinguishable from violations of the law of contract and property and that these wrongs were actionable in the absence of statutory permission. Although the body of law governing the right to sue for damages inflicted by another was not recognized at the time as the field of law now called "Torts," the underlying concepts date back centuries.[12]

Prior to the enactment of the First Judiciary Act, Blackstone observed in his COMMENTARIES that:

> Personal actions are such where by a man claims a debt, or personal duty, or damages in lieu thereof: and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, *the latter upon torts or wrongs* . . . of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like.

2 William Blackstone Commentaries *117 at 69 (emphasis supplied). Blackstone also noted that criminal and civil liability could arise out of the same act: "for . . . assault, battery, wounding, and mayhem, an indictment may be brought *as well as an action*; and frequently both are accordingly prosecuted; the one at the suit of the crown for the crime against the public, the other at the suit of the party injured, to make him a reparation in damages." *Id.* at *123 (emphasis supplied).

There was no understanding that such suits required further definition by statute or that the propriety of the action depended on some statutory authorization to sue. To the contrary, the injured party was entitled to a "remedy by suit or action in the courts of common law . . . ." *Id.*, at *118.[13] As shown more fully in the Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents ("hereinafter Historians' *Amicus* Brief"), Sosa's interpretation of the ATCA requires the Court to assume that the drafters of

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[11] Even Professor Bradley, who has led the academic attack on ATCA, concedes that "there would have been no reason for the First Congress to create a federal statutory cause of action for torts in violation of the law of nations. The law of nations was considered at the time to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary." Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 *Va. J. Int'l L.* 587, 595 (2002).

[12] *See, e.g.*, Robert J. Kaczorowski, *The Common-law Background of Nineteenth-Century Tort Law*, 51 Ohio St. L.J. 1127, 1199 (1990); *See* John Henry Wigmore, *Responsibility for Tortious Acts: Its History*, in 3 Association of American Law Schools, Select Essays in Anglo-American Legal History, (1909) at 474-573.

[13] *See also* 3 William Blackstone Commentaries, at *123 ("wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and therefore, wherever a new injury is done, a new method of remedy must be pursued."). In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice Marshall cited precisely this passage, stating that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, when that right is invaded." In attempting to minimize the value of this contemporary understanding, *Pet. Brf.* at 10-11, Petitioner cites *Alexander v. Sandoval*, 532 U.S.275, 288 (2001), and *Cannon v. University of Chi.*, 441 U.S. 677, 699 (1979), on the erroneous assumption that a right to sue can only be created by statute.

the First Judiciary Act used the word "tort" in some innovative and specialized way that was directly contrary to its well-established common law meaning.

2. "***Committed in violation of***." The use of the word "violation" in the statute independently confirms the uniform interpretation of the ATCA by the lower courts. "Violation" does not appear in any provision of Section 9 of the First Judiciary Act other than in the alien tort provision, nor does it appear in any other section of Chapter 85 defining the jurisdiction of the federal district courts.[14] Unlike other, purely jurisdictional statutes now codified in Title 28 of the United States Code, there is no reference to additional legislation and certainly no requirement that the case "arise under" federal law.[15]

That contrast must be assumed to have been deliberate, and it is instructive. Though separated by decades, the

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[14] Petitioner also argues that the title of Chapter 85 ("District Courts: Jurisdiction") implies that Section 1350 does not create a cause of action. *Pet. Brf.* at 11-12. But this Court has long held that a statute's title and its placement are not to be relied upon when the language of the statute, as here, is clear. *Brotherhood of R.R. Trainmen v. Baltimore & Ohio Ry. Co.*, 331 U.S. 519, 529 (1947).

[15] As fully explained in the Historians' *Amicus* Brief, pp 16-18, the first three clauses of Section 9 contemplated that Congress *might* enact legislation under which a criminal prosecution or civil suit might be brought, and the federal courts enjoyed exclusive jurisdiction. But the last three, including the alien tort provision, were quite distinct. In this latter group, there is no mention of "the laws of the United States," and, under the fourth and fifth clauses, the district courts' jurisdiction was concurrent with that of the state courts, evincing the expectation that the suits thereunder were to be brought at common law. That also distinguishes the ATCA from the jurisdictional provisions cited by Petitioner, *Pet. Brf.*, at 11, involving suits commenced by the United States, 28 U.S.C. § 1345, or involving the partition of lands where the United States is a tenant in common or joint tenant. 28 U.S.C. § 1347.

requirement under Section 1350 that a plaintiff show a "violation" of the law of nations stands in marked contrast to the requirement under the federal question jurisdiction statute that the plaintiff's claim "arise under" federal law, 28 U.S.C. § 1331, and it is especially significant, as then-district judge Rymer noted in *Handel v. Artukovic*, 601 F. Supp. 1421, 1427 (C.D. Cal. 1985): "the 'violation' language of section 1350 may be interpreted as explicitly granting a cause of action" even if "the 'arising under' language of section 1331 cannot." *Id.*, at 1426-27 . The dissent below, which was joined by Judge Rymer, does not dispute this conclusion.

Interpreting the ATCA to require a separate enabling statute rewrites the text as though it provided federal jurisdiction over civil actions by aliens only for torts "*arising under statutes defining*" violations of the law of nations or a treaty of the United States. Judicial redrafting of that sort is foreclosed by the first principles of statutory construction: the original text does not allow it and the contemporary consequence would be to render the ATCA meaningless.[16]

3. "***The law of nations or a treaty of the United States***." Petitioner's interpretation of the ATCA is also foreclosed by the "law of nations" language in the statute. The law of nations was part of the law of the United States when the First Judiciary Act was adopted, and it defined actionable rights even without legislative implementation or incorporation by Congress. *See*

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[16] Citing no authority other than a law review article, Petitioner argues that the early cases interpreting the ATCA imply that the word "torts" refers only to wrongs under the law of prize. Pet. Br. at 29 n 9. This interpretation, implausible for many reasons, cannot be accepted because it renders ATCA superfluous from the day of its passage. Such wrongs would have been subsumed within the district court's admiralty and maritime jurisdiction. *See* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Corp. L. Rev. 221, 243-53 (1996).

Historians' *Amicus Brf.*, at 11-21. To suggest, as Petitioner does, that the "law of nations" was unenforceable unless explicitly incorporated by Congress is directly contrary to the common understanding of international law at the time, as expressed by the Executive Branch, the courts, and the Congress itself.

a. ***The Executive Branch.*** Only six years after the First Judiciary Act, Attorney General Bradford recognized the status of the ATCA as the basis for an alien's suit to enforce international norms, without further Congressional action. The Attorney General was asked to consider the potential liability of U.S. citizens who had aided the French in attacking the British colony in Sierra Leone, in violation of the state-to-state obligations of neutrality. He concluded that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be, *i.e.*, without the statutory permission Petitioner now argues is required:

> ... [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility *have a remedy by civil suit in the courts of the United States*; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States.

Breach of Neutrality, 1 *Op. Att'y Gen.* 57, 59 (1795). The injured aliens to whom Attorney General Bradford refers had no explicit statutory right to sue in tort, other than the ATCA, but Attorney General Bradford concluded nonetheless that the aliens' injury in violation of the law of nations or a treaty of the United States would be actionable in federal district court under

the predecessor to section 1350.[17] There is no hint that the Attorney General believed that Congress needed to act, as Sosa now claims, to implement ATCA. That the failure to provide such a civil remedy might cause an international incident, as Petitioner concedes, *Pet. Brf.* at 21-22, reinforces the propriety of ATCA actions.

Petitioner trivializes this contemporaneous statement from the Attorney General on the primary issue in this case, Pet. Br. at 37-38, n.13, by implausibly characterizing it as an overstatement. *See Historians' Amicus* Brief, at 20 n 14. But that explanation, as far-fetched as it is, still offers no escape from Attorney General Bradford's plain opinion, namely that the ATCA was available to remedy violations of the law of nations without any supplemental Congressional action.

b. ***The Judicial Branch***. Contemporaneous court decisions reinforce Attorney General Bradford's analysis.[18] In

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[17]Bradford's understanding was affirmed by Attorney General Bonaparte in 1907, after Mexico and the United States entered into a bilateral treaty defining the boundary between the two states and protecting certain riparian rights for both countries. Although the treaty provided for no private rights or obligations, the Attorney General concluded that an action under the ATCA would be proper, on the ground that the statutory precursor to the ATCA "provide[s] a right of action *and* a forum" if "the diversion of the water [of the Rio Grande] was an injury to substantial rights of citizens of Mexico *under the principles of international law* or by treaty, *and could only be determined by judicial decision*." Attorney General of the United States, *Mexican Boundary – Diversion of the Rio Grande*, 26 Op. Att'y Gen. 250, 252 (1907) (emphasis supplied).

[18] In its *amicus* submission, the Justice Department attempts to minimize the importance of these cases by arguing that the courts "considered Section 1350's predecessor only as a potential alternative basis for jurisdiction." This half-truth obscures the fact that the courts not only *considered* the statute as an alternate basis but also *accepted* it as such.

Bolchos v. Darrel, 3 F. Cas. 810 (D. S. Car. 1795), rendered only six years after the Judiciary Act, the plaintiff sought restitution for the value of slaves on a captured Spanish ship. The court recognized that it had jurisdiction in admiralty (an area of common law jurisdiction informed by the law of nations), but declared that, "as the [ATCA] gives this court concurrent jurisdiction ... where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt" as to jurisdiction. *Id.* at 810. According to the court, both the law of nations and a treaty with France provided a rule of decision: "the law of nations would adjudge neutral property, thus circumstanced, to be restored to its neutral owner; but the 14th article of the treaty with France alters that law, by stipulating that the property of friends found on board the vessels of an enemy shall be forfeited." *Id.* at 811.

Nowhere in the opinion did the court make any mention of any additional Congressional action needed to allow the plaintiff to invoke substantive rights under the treaty or the law of nations. The latter rights already existed in American law by virtue of the incorporation of the law of nations into the common law of the United States. 1 James Kent, COMMENTARIES ON AMERICAN LAW 195 (13th ed. 2001); Edwin Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 *U. Pa. L. Rev.* 26, 35-36 (1952).

Similarly, in *Moxon v. The Fanny*, 17 F. Cas. 942 (1793), the district court for the district of Pennsylvania considered whether an action for the return of a ship allegedly seized in violation of international law could be brought under the ATCA. The court stated, "[n]either does this suit for a specific return of the property, appear to be included in the words of the [ATCA].... It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for." *Id.* at 947-48. There is no suggestion that a specific cause of action, above and beyond the tort in

question, was required. To the contrary, the suit failed not for lack of a cause of action but for the failure to plead it correctly.

Contemporary decisions by this Court and state courts under the law of nations also conclusively foreclose Petitioner's contention that customary international law rights at the founding of the Republic did not give rise to enforceable rights unless they were "otherwise authorized," *Pet. Brf.* at 29-30. *See, e.g.*, *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796); *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784) (applying international law in criminal case without any legislative enactment).

In *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), this Court confirmed that customary international law created enforceable rights even without any enactment or codification, declaring "[i]f it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. *Till such an act be passed*, the Court is bound by the law of nations which is a part of the law of the land." *Id.* at 423 (emphasis supplied). As shown in § I.C. 1, *infra*, customary international law remains an area in which no affirmative legislative act is required to "authorize" its application in U.S. courts. *See* Louis Henkin, *International Law as U.S. Law*, 82 MICH. L. REV. 1555, 1561 (1984) ("International law…is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.") .

c. ***The Legislative Branch***. Contending that it is "inconceivable" that the First Congress meant what it actually said in the ATCA, Petitioner and his *amici* attempt to introduce uncertainty into the statute by perpetuating one judge's observation in 1975 that the statute is a "legal Lohengrin. . ." However, since 1975, when Judge Friendly made this statement, significant archival research makes it possible to

determine "whence it came."[19] In 1781, eight years prior to the Constitution of the United States and the First Judiciary Act, the Continental Congress, lacking the legislative power to do more, urged the newly independent states to enact judicial remedies for violations of the treaties of the United States and the law of nations. 21 JOURNAL OF THE CONT. CONG. 1774-1789, at 1137. The resolution specifically urged the States to "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." *Id.* One year later, the Connecticut legislature passed "An Act to Prevent Infractions of the Laws of Nations," criminalizing specific violations of the law of nations and providing a tort-based remedy for injuries "to any foreign Power or to the Subjects thereof." *See* Acts and Laws of the State of Connecticut, in America 83 (1784).

That only one state followed the recommendation epitomized the inability of the Continental Congress to assure that the law of nations would be given effect in the new nation, including within the courts of the various states. This threat to the young Republic's international standing and security was made clear three years later when a French citizen, the Chevalier De Longchamps, assaulted the French Consul

[19] *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.). *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1 (1985); William R. Castro, *The Federal Court's Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 488-89 (1986); Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. Int'l L. 461 (1989); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l Comp. L. Rev. 221 (1996); Historian's *Amicus Brf.*, at 3-11.

General, Francis Marbois, on the streets of Philadelphia. *See Respublica v. de Longchamps*, 1 U.S. (1 Dall.) 111 (1784). As developed more fully in the Historians' *Amicus* Brief, the diplomatic outcry was immediate and sustained, but the national government was powerless, and the Continental Congress was obliged to explain to Marbois that its authority was limited by "the nature of a federal union in which each State retains a distinct and absolute sovereignty in all matters not expressly delegated to Congress leaving to them only that of advising in many of those cases in which other governments decree." 28 JOURNALS OF THE CONT. CONG. 1774-1789, at 314. The Pennsylvania Supreme Court eventually convicted de Longchamps for an offense against the law of nations, which, without legislative enactment, "in its full extent, . . . [is] part of the law of this State." *de Longchamps*, 1 U.S. (1 Dall.) at 116.[20]

There can be no doubt that Marbois could also have brought a common law tort action against his assailant in state court, and for Petitioner to argue that Marbois must have been powerless because there was no statute authorizing the action is to treat torts in violation of the law of nations *less favorably* than other torts. There is absolutely no basis in the historical record for that conclusion.

Four years after the Marbois incident, confronting a similar incident involving the Dutch Ambassador in New York City, the Secretary for Foreign Affairs, John Jay, conceded that "the foederal [sic] Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases." Secretary for Foreign Aff. Rep. on the complaint of Minister of United Netherlands (Mar. 25, 1788), *reprinted in* 34 Journals of the Cont. Cong. 109, 111

[20] The prosecution was led by William Bradford, later Attorney General of the United States, and author of the 1795 opinion on the ATCA, *supra*, at 15.

(1788). There can be no doubt that the delegates to the Constitutional Convention, like the members of the First Congress, had this recent experience in mind when they recalibrated the scales of power in the young Republic. At the Convention, Edmund Randolph and James Madison specifically complained about this weakness of the national government. 1 M. Farrand, The Records of the Federal Convention of 1787 24-25 (1911) (Randolph); *id.* at 316 (Madison). Madison later supported the Constitution on the ground that "[t]hese articles [of confederation] contain[ed] no provision for the case of offenses against the law of nations; and consequently [left] it in the power of any indiscreet member to embroil the Confederacy with foreign nations." THE FEDERALIST NO. 42, at 264-65 (J. Madison) (C. Rossiter ed., 1961).

The Constitution and the First Judiciary Act together transformed the recommendations in the 1781 resolution into law, granting to Congress the power to define and punish offences against the law of nations, U.S. CONST, art. I, § 8, cl. 10. In short order, Congress established the federal courts' criminal jurisdiction over wrongs "cognizable under the authority of the United States," Judiciary Act of 1789, ch. 20, §§ 9 & 11, 1 Stat. at 76-77, 78-79, and the federal courts' civil jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. at 77.[21] The following year, Congress defined some of the international crimes that were "cognizable under the authority of the United

[21]Sosa suggests that the unexpressed limitation on ATCA which he asks this Court to read into the statute reflects some undocumented compromise with the anti-federalists. *Pet. Brf.* at 16-18. In truth the lack of debate about the alien tort provision of the Judiciary Act shows that it was broadly accepted by Federalists and Anti-federalists alike.

States." In doing so, it identified the offences contained in the 1781 resolution, such as violations of safe-conducts and assaults on ambassadors and public ministers, *see* An Act for the Punishment of Certain Crimes against the United States, ch. 9, § 28, 1 Stat. 112, 118 (1790), but it also allowed the federal courts "to pronounce on additional offenses as they arose.... [B]oth the district and the circuit courts obtained jurisdiction over statutory and common law crimes in violation of the law of nations." Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 *Am. J. Int'l L.* 461, 477 (1989).

Although the federal judiciary's power to enforce common law crimes was soon curtailed, *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), "its authority with respect to torts remained unchallenged." Burley, *supra*, at 477-78. Indeed, "for a considerable period in early American judicial history, the federal courts were free to develop a common law for civil cases . . . without provoking serious objection." Stewart Jay, *Origins of the Federal Common Law, Part 2*, 133 *U. Pa. L. Rev.* 1231, 1276 (1985).[22]

Given the notoriety of the Marbois incident, the prominence of the 1781 resolution, and the necessity of providing civil relief to aliens injured by violations of the law of nations, the fact that Congress then, as now, felt no additional need to define actionable international torts is not surprising. The simple explanation is truer to the text: Congress did not think it necessary to do more than it did to provide a

[22]Emmerich de Vattel, the leading 18th-century publicist on the law of nations, *United States Steel Corp. v. Multistate Tax Comm.*, 434 U.S. 452, 462 n 12 (1978), underscored that providing a private remedy for foreigners injured by violations of international or domestic law was an essential means of reducing friction between nations. 2 EMMERICH DE VATTEL, THE LAW OF NATIONS, ch. 6, §§ 71 and 78 (Chitty, ed. 1852)

federal forum for these actionable violations of the law of nations. Sosa's interpretation, by contrast, would render the ATCA nugatory from its inception.

B. The Framers Understood the Transitory Tort Doctrine and Provided a Federal Forum in Which Such Claims Could Be Heard.

The Framers understood that tort suits between aliens fell within the individual states' general jurisdiction. Even before the American Revolution, civil actions in tort were routinely considered transitory, in that the tortfeasor's wrongful act created an obligation to make reparations, that followed him across national boundaries and was enforceable wherever he was found. This Court has traced the transitory tort doctrine to Lord Mansfield's opinion in *Mostyn v. Fabrigas*, 1 Cowp. 161 (K.B. 1774), noting that

> The courts in England have been open in cases of trespass other than trespass upon real property, [i.e. civil torts] to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespass committed within the realm and out of the realm, or within or without the king's foreign dominions

McKenna v. Fisk, 42 U.S. 241, 249 (1843). The state courts understood and regularly exercised this power.[23] Indeed, the

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[23] *See, e.g.*, *Watts v. Thomas*, 5 Ky. (2 Bibb) 458, 1881 WL 853 (1811); *Stout v. Wood*, 1 Blackf. 70 (Ind. Circ. Ct. 1820); *Taxier v. Sweet*, 2 U.S. (2 Dall.) 81, 84 (Sup. Ct. Penn. 1766); *Pease v. Burt*, 3 Day 485, 1806 WL 202, at *2 (Conn 1806) ("[A]ll rights of a personal nature are transitory. A right to personal property; a right to a personal action, whether founded on a contract, or on tort . . . extend to, and may be exercised, and enforced in, any other civilized country, where the

author of the First Judiciary Act, Oliver Ellsworth, who had also been a member of the Continental Congress that adopted the 1781 resolution, *supra*, and of the Connecticut legislature that implemented those recommendations, *supra*, had himself applied the transitory tort doctrine in 1786, while a sitting judge in Connecticut Superior Court. *Stoddard v. Bird*, 1 Kirby 65, 68, 1786 WL 19 at *2 (Conn. 1786) (Ellsworth, J.) ("Right of action [for the tort of false imprisonment] against an administrator is transitory, and the action may be brought wherever he is found.").

In these transitory tort actions, "[t]he theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, which, like other obligations, follows the person, and may be enforced wherever the person may be found." *Slater v. Mexican Nat'l Ry. Co.*, 194 U.S. 120, 126 (1904). The general jurisdiction of the state courts extended to transitory torts, protecting each state's legitimate interest in the resolution of disputes brought within its borders. *See Dennick v. Central Ry. Co.*, 103 U.S. 11, 18 (1880) (recognizing transitory tort doctrine.) Then, as now, a narrow construction of the ATCA would simply give state courts exclusive authority over such tort claims. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 510 (1986) (noting that a narrow construction of ATCA will vest state courts with jurisdiction, perhaps exclusive, over such claims.).

The First Congress would have had no reason to interfere with the states' right to hear ordinary transitory tort suits, but it would understandably have wished to assure the possibility of a federal forum for that limited subset of transitory torts that also involve a violation of the law of nations

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parties happen to be.")

or a treaty of the United States. Otherwise, the nation faced the prospect of multiple and inconsistent interpretations of international law, and the Framers' recent experience under the Articles of Confederation had confirmed that such a prospect was intolerable. *See* Historians' *Amicus Brf*, at 3-11. Section 1350 simply filled the need for that federal option. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n 25 (1964) (describing Section 1350 as one of many statutes "reflecting a concern for uniformity in this country's dealings with foreign nations and . . . a desire to give matters of international significance to the jurisdiction of federal institutions.").

The contemporary interpretation of the ATCA is fully consistent with its language and history, and it also works no unprecedented enlargement of federal judicial power. The scope of the ATCA has seemed to increase only because all branches of government have accepted fundamental international human rights norms as part of the "law of nations." That the ATCA would be available to implement these commitments in appropriate cases is fully in keeping with the ATCA's language, context and intent. In defiance of both, Petitioner's proposed interpretation rests on his unsupported incredulity that the Founding generation would authorize federal courts to implement the law of nations and enforce the Nation's international commitments.

C. The *En Banc* Court's Interpretation of the ATCA Is Consistent with This Court's Traditional Approach to Both International Law as Law of the United States and to Causes of Action Generally.

1. International Law as Law of the United States

This Court has explicitly approved the application of international law in U.S. courts in the absence of Congressional enactment:

> International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. *For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators* who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis supplied). *See generally Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S 398 (1964).

In *Paquete Habana* and its progeny, this Court articulated strict criteria for proving the content and

applicability of the law of nations when Congress has not addressed the international norm. As a consequence, contrary to the Petitioner's assertion, *Pet. Brf.* at 40-43, the ATCA does not and cannot enforce unratified or non-self-executing treaties.[24] Nor does the ATCA convert non-binding resolutions of the United Nations into law.

Paquete Habana and its progeny require the courts to identify the content of the law of nations by determining the existence *vel non* of a consistent state practice recognized out of a sense of legal obligation (*opinio juris*). *Restatement (Third), supra,* n 7, § 102(2). Customary international law consists of the actual rules that States abide by, or accede to, out of a sense of legal obligation and mutual concern. Although the process of ascertaining customary norms can be more laborious than domestic legal analysis, the Founders were quite familiar with this process. This Court has often employed the traditional means of determining the existence and scope of customary norms even without the authorization of Congress.

Contrary to Petitioner's hyperbolic recitation of abusive *claims* under the ATCA, the actual *decisions* of the courts under the ATCA show a judiciary familiar with this process, successfully distinguishing between norms that are "specific, universal, and obligatory,"[25] and those that are not.

In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Second Circuit reached the unremarkable conclusion that the prohibition against torture was a violation of a "specific,

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[24]Nor can the ATCA be judicially limited to the enforcement of self-executing treaties, because that would delete the "law of nations" provision of the statute.

[25] *See, e.g. In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) (torture); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (genocide).

universal, and obligatory" norm of customary international law, relying on multiple, reinforcing forms of evidence, as dictated by *Paquete Habana*. No government has disagreed with that conclusion,[26] based as it was *inter alia* on treaties in consistent form, laws and constitutions of states around the world, resolutions of international organizations condemning torture, the merely factual defenses offered by non-conforming states, the writings of publicists, and a brief from the United States supporting the exercise of jurisdiction. *Id.*, at 882-84. These authorities were consulted not because they were binding as a treaty might be, but because they offered conclusive evidence that states considered torture illegal as a matter of international

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[26] Some of Petitioners' *amici*, including the government of the United States and of three foreign states, oppose the use of the ATCA to redress torts in violation of international law that occur outside of U.S. territory. *See, e.g., U.S. Amicus Brf.* at 46-50. Notably, the transitory tort doctrine is ignored by these amici, even though it is well-known in the domestic law of each of them. But even on its own terms, the argument is unconvincing: the presumption against the extraterritorial application of U.S. law, which under this Court's precedent plainly applies to the DEA's statutory authority to arrest suspects abroad, *see* Dr. Alvarez' Brief in No. 03-485, cannot apply to common law transitory torts brought within the personal jurisdiction of U.S. courts by the defendant's very presence. To argue otherwise makes nonsense of this Court's transnational rulings in *Slater* and its progeny, as well as its history tutorial in *McKenna*, not to mention the briefs filed by the U.S. government supporting jurisdiction in *Filartiga* and *Karadzic*, infra. Moreover, because the law of nations consists in norms that are "specific, universal, and obligatory," courts interpreting the ATCA have carefully established that the wrongs at issue do not involve idiosyncratic norms. This is fully consistent with Attorney General Bradford's contemporaneous understanding of the ATCA's reach and its obvious application to extraterritorial conduct such as piracy. Finally, the explicit references in the ATCA to "aliens" and to the "law of nations" confirm that Congress intended that the ATCA would apply to conduct outside the United States. This was, of course, the view of Attorney General Bradford in 1795. *See* pp. 14-15, *supra*.

law. This is no more at odds with the judicial role than this Court's meticulous historical analysis of the norm protecting domestic fishing vessels from seizure as prize in times of war, *Paquete Habana*, 175 U.S. at 687-712, or the international norm defining piracy, *United v. Smith*, *supra*, or the lack of a norm limiting the right of states to nationalize the property of aliens, *Sabbatino*, 376 U.S. at 428-31.

Subsequent ATCA cases, including the cases cited by Petitioner, *Pet. Brf.* at 45, n. 14, show that the courts are not receptive to cases that do not satisfy the high burden of proof.[27] *See, e.g., Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) (environmental torts not in violation of customary international law).[28] In these cases, the courts

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[27] For his cause of action analysis, Petitioner and his *amici* rely heavily on Judge Bork's separate concurrence in *Tel-Oren v. Libyan Arab Republic*, *supra*, a *per curiam* dismissal the Solicitor General described at the time as "hav[ing] little, if any, precedential value." Brief of the United States as Amicus Curiae Filed in Opposition to Petition for Certiorari, at 9, *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (D.C. Cir. 1984) (No. 83-2052). Although Judge Bork proffered the cause of action analysis relied upon by Sosa, his concurrence actually preserved the result in *Filartiga*, emphasizing that "the international law rule invoked in *Filartiga* was the proscription of official torture, a principle that is embodied in numerous international conventions and declarations, that is 'clear and unambiguous' in its application to the facts in *Filartiga*, [630 F.2d] at 884, and about which there is universal agreement 'in the modern usage and practice of nations.'" 726 F.2d at 819-20. Petitioner's similar reliance on Judge Randolph's concurrence in *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003), is similarly misplaced. *Pet Brf*, at 42. In *Al Odah*, a case resolved under *habeas* principles, no other member of the panel joined Judge Randolph's separate concurrence concerning the ATCA.

[28] For a more comprehensive description of cases rejecting ATCA claims, *see Brief of Human Rights Organizations*, at §I.

naturally give weight to the expressed positions of the Executive branch on the existence and meaning of a particular norm. But it does not follow that the customary norm does not exist just because a low level official violated it in a particular case; otherwise *Paquete Habana*, which has stood for over a century, would be incoherent. The fact that the Justice Department has taken litigation positions on behalf of Sosa and the United States in no way suggests that the United States has altered its consistent view that extraterritorial, nonconsensual abductions violate international law.

Nor is it unusual, unprecedented, imprudent or unconstitutional for federal courts to fashion common law principles to govern those aspects of ATCA litigation not governed by the express Congressional incorporation of tort law and the "law of nations."

Petitioner also objects to any interpretation of the ATCA that allows the federal courts to employ traditional federal common law techniques to facilitate the litigation of tortious international law violations under the ATCA. *Pet. Brf.* at 26-33. This argument is flawed in its premises.

Initially, Petitioner simply repeats his earlier contention that Congress intended the ATCA to be exclusively jurisdictional, *Pet. Brf.* at 27-30, and he cites *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), for the proposition that "The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." *Id.*, at 640-41. A more complete analysis of *Radcliff Materials* must acknowledge that it unanimously recognized the "need and authority in some limited areas to formulate what has come to be known as 'federal common law' in cases in which a "federal rule of decision is necessary to protect uniquely federal interests,"

including "our relations with foreign nations." *Id.*, at 638-41 (1981).[29]

Petitioner now asserts that *Sabbatino* only stands for a rule of deference to the political branches, *Pet. Brf.* at 30, but nothing in *Radcliff Materials* or *Sabbatino* suggests that the political branches have plenary and exclusive control over the law of nations as the law of the United States. "Primacy," *Pet. Brf.* at 32, is not exclusivity, and the Framers certainly never understood that the federal judiciary's power to construe customary international law was subordinate to the concurrent authority of the political branches.[30]

For example, Petitioner and the government as *amicus curiae* stress the Constitutional power of Congress to "define and punish offences against the law of nations," and doubtless Congress can statutorily specify those offences or correct judicial "errors" in that regard, but it can also take the half-way step of directing federal courts to hear cases where such

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[29] *Accord Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) ("we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the national Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.").

[30] Indeed, in ATCA cases other than this one, the Executive Branch has endorsed the power of the courts to apply the strict standards of customary international law and thereby to develop federal common law. *See, e.g.*, Memorandum for the United States to the Court of Appeals for the Second Circuit in *Filartiga v. Pena Irala*, (No. 79-6090), at 1, *reprinted in* 19 I.L.M. 585 (1980) ("Customary international law is federal law, to be enunciated authoritatively by the federal courts.") Congress expressed a similar understanding in the legislative history of the Torture Victim Protection Act, S. Rep. No. 102-249, at 6 n. 6 (1991) ("International human rights cases predictably raise legal issues – such as interpretations of international law – that are matters of federal common law and within the particular expertise of federal courts.").

offences are alleged, as in the ATCA itself. *Ex parte Quirin*, 317 U.S. 1, 27(1942). And even when Congress is silent, the Court may apply federal common law "necessarily informed both by international law principles and by articulated congressional policies." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (O'Connor, J.) (citing, *inter alia,* the International Court's decision *in Case Concerning The Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 3, for international standards of corporate law, *id.*, at 630 n.20). As shown below, the "articulated congressional policy" in this case fully supports *Filartiga* and its progeny.

The famous dictum of Justice Brandeis in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), that "[t]here is no federal general common law," is too thin a reed to support Petitioner's claim that the federal courts must await permission from the political branches before consulting and applying the law of nations. Nothing in *Erie* suggests that this Court intended to displace more than a century of precedent and practice treating the law of nations as a legitimate and salutary example of federal common law. Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740 (1939).

Moreover, Petitioner's extension of *Erie* from its diversity context to the ATCA leads to the absurd conclusion that, in the absence of some supplemental cause of action legislation, "the law to be applied in any case is the law of the State," *Erie*, 304 U.S., at 78, threatening the very chaos that the founding generation thought it had avoided and that this Court

has repeatedly and recently disapproved. *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003).[31]

In the ATCA, Congress authorized the federal courts to hear and decide cases involving tortious violations of the law of nations, but guided always by this Court's criteria for proving the content of customary international law. As is the case in many other contexts, including 42 U.S.C. § 1983, Congress did not supply detailed rules to govern the litigation of such cases. Thus, to make this grant of decision-making authority effective, the federal courts in ATCA cases must derive federal common law rules to govern such issues as statutes of limitation, standing to sue, exhaustion of remedies, third party complicity and the like. At any time Congress may disapprove of such common law rules of decision or the entire grant of decision-making authority in the ATCA.

2. Causes of Action

Petitioner invokes this Court's precedents for determining whether a substantive statute creates a private right of action, *e.g.*, *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983); *Alexander v. Sandoval*, 532 U.S. 275 (2001); and *Cannon v. University of Chic.*, 441 U.S. 677 (1979). *Pet. Brf.* at 9. None of these cases dealt with the language of a

[31] Petitioner's position tracks the arguments of the academic "revisionists" on the status of customary international law as law of the United States, *see* authorities cited at *Pet. Brf.* at 31-33, without acknowledging the failure of this critique to convince any court that their position is correct. Nor do Petitioner's address the numerous and persuasive critiques of the "revisionists"' view. *See, e.g.*, Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463 (1997); Harold Hongju Koh, *Is International Law Really State Law*, 111 Harv. L. Rev. 1824 (1998); Gerald Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371 (1997).

statute that brought with it a common law right of action, and they are therefore readily distinguishable. Equally important, these cases make Congressional intent the dominant consideration in determining whether a statute creates a private right of action or not. *See also Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979) ("The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."). As shown above, in this case, the ample textual, historical, and structural evidence of Congress's intent in passing the ATCA makes the test in *Sandoval* unnecessary and inappropriate. Certainly the difference between the vocabulary of rights in 1789 and the approach embodied in *Sandoval* cautions against using the convenient analysis offered by Petitioner.

Even on its own terms, however, the ATCA satisfies the *Sandoval* criteria, taken together. Petitioner focuses on only one of these, namely the presence or absence of "'rights creating' language." *Sandoval*, 532 U.S. at 288. But the ATCA's reference to a "tort in violation of the law of nations" qualifies if not as "rights-creating language," then certainly as rights-recognizing language, which better fits a statute that also establishes subject matter jurisdiction over an identifiable set of claims instead of creating some administrative or regulatory regime.

Petitioner ignores the other *Sandoval* criteria but the ATCA clearly satisfies them. *Sandoval* makes clear, for example, that a statute that focuses on the individuals protected implies an intent to confer rights on a particular class of persons. *Id.*, at 289. *See also Gonzaga Univ. v. Doe*, 532 U.S. 273, 284 (2003): "For a statute to create such private rights, its text must be phrased in terms of the persons benefitted." *Id.*, at 284 (*citing Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), 692 n.13). The ATCA clearly identifies a "class of persons protected versus regulated persons" by focusing on aliens who

are victimized by tortious violations of international law. *Sandoval*, 532 U.S. at 289. This is not a statute that focuses on regulating an agency or providing funds to some recipient. *Id.* at 289. And, in contrast to the administrative "methods of enforcement" provided by the statute in *Sandoval* and similar cases, here the ATCA clearly refers to a mode of enforcement that is quintessentially judicial. There was no need to create a separate remedial scheme in addition to the ATCA itself.

D. The Petitioner's Interpretation of the ATCA Fundamentally Mischaracterizes the Torture Victim Protection Act and Other Congressional and Executive Actions.

Petitioner's interpretation of the ATCA is incompatible with the enactment of the Torture Victim Protection Act of 1992 ("TVPA"), 28 U.S.C. § 1350 note. Congress expressly viewed the TVPA as reaffirming a pre-existing cause of action (and extending it to U.S. citizens), not as creating a new one. According to the House Report, "[t]he TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 . . . ." H.R. Rep. No. 367, 102d Cong., 1st Sess., pt. 1 (1991).

Significantly, the House Report referred to the *Filartiga* decision with approval, affirmed the importance of ATCA, and indicated that the ATCA "should not be replaced." *Id.* The Senate Report contains virtually identical language. S. Rep. No. 249, 102d Cong., 1st Sess. (1991). Congress was also fully aware of the fractured opinions in *Tel-Oren* and Judge Bork's

views and, according to its principal sponsor, the TVPA was adopted to "lay it all to rest".[32]

The House Report also contradicts Petitioner's argument that "the actions of the 102nd Congress undermine, rather than support, implication of an ATCA cause of action," *Pet. Brf.* at 44. To the contrary, Congress was well aware that

> claims based on torture or summary executions *do not exhaust the list of actions that may appropriately be covered by section 1350.* That statute should remain intact *to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.*

H.R. Rep. No. 102-367, 102nd Cong. 1st., pt 1,at 4 (1991) *reprinted in* 1992 U.S.C.C.A.N. 84,86. Petitioner's contention that "aliens do not have a cause of action to sue for other alleged violations of international law," *Pet. Brf.*, at 44, is not supported by the text of the TVPA and is directly contradicted by its history.[33]

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[32] Torture Victim Protection Act of 1989, Hearings Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary, 101st Cong. 36, 65 (1990) (statement of Senator Specter).

[33] In numerous judicial decisions, the courts have found significance in the fact that Congress had a clear opportunity to revise or restrict the ATCA in light of *Tel-Oren* and did the opposite. *See, e.g., Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, 105 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Cabello v. Fernandez-Larios*, 157 F.Supp. 2d 1345, 1365 (S.D. Fla. 2001); *Doe v. Islamic Salvation Front (FIS)*, 993 F.Supp. 3, 7 (D.D.C. 1998); *Abebe-Jira v. Negewo, supra*, 72 F.3d at 848; *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995).

Sosa and his *amici* invoke the TVPA as an implicit limit on the ATCA, as though the codification of *Filartiga* and its extension to U.S. citizens implicitly requires similar legislative authorization of specific "torts in violation of the law of nations or a treaty of the United States." As shown above, in order to make this argument, Petitioner has to distort the text and ignore the TVPA's explicitly stated intent.

No one, including Dr. Alvarez, argues that subsequent legislative history should be controlling authority in determining a prior Congress's intent. But this Court has observed that subsequent action by Congress "should not be rejected out of hand as a source that a court may consider in the search for legislative intent," *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 (1980). This is especially true here, given the similarities between the ATCA and the TVPA and the fact that "the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *Food and Drug Administration v. Brown & Wilkinson*, 529 U.S. 120, 143 (2000).

Nor can it be said that the TVPA is useful solely for the light it sheds on the original intent behind the ATCA: its significance lies in the evidence it offers that Congress approved the post-*Filartiga* trajectory of the Act and rejected the restrictive approach proposed by Judge Bork.[34] Equally important, in passing the TVPA only 13 years ago Congress could have repudiated the interpretation of ATCA challenged here. It could have expressed separation of powers concerns or any of the other concerns now expressed by Sosa and his *amici*. Instead Congress endorsed ATCA as a vehicle for U.S. courts to hear human rights claims. *See Lorillard v. Pons*, 434 U.S.

[34] It is axiomatic that Congress is presumed to know the law, including recent precedents directly applicable to the issue before it. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-99 (1979).

575, 580-81 (1978). "Judicial interpretation and application, *legislative acquiescence*, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act's requirements." *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (*citing Ernst & Ernst*, 425 U.S. at 196; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975)) (emphasis supplied).

E. "Foreign Policy Implications" Do Not Justify a Prophylactic Barrier to All ATCA Litigation. Petitioner's Approach Circumvents Congressional Process and Violates the Separation of Powers.

Sosa and his *amici* assert that the separation of powers is a "compelling factor counseling hesitation" in the recognition of a cause of action under the ATCA. *See Pet.* Brf. at § III B. Repeatedly invoking the separation of powers, Petitioner and his *amici* actually pose the more certain threat to the separation of powers by asking this Court to amend the ATCA through limitations that are unwarranted by its text and context, without convincing the Congress that these limitations are necessary. The separation of powers should not lead the Court to interpret a statute – or any part of it – in such a way as to read it off the books.

The Justice Department argues that ATCA cases are inherently nonjusticiable because the types of claims that are being asserted today under the ATCA are inherently fraught with foreign policy implications, raising the possibility that citizens of U.S. allies will be sued under the ATCA or that litigation under the Act will compromise the war on terrorism. Of course, this case has no relation whatsoever to the war on terrorism. Failure to provide redress to Respondent is more likely to cause offense to our ally Mexico, which is precisely

why the ATCA was passed at the birth of the Republic. The main change over time is that the United States now enjoys unrivaled power when in 1789 the United States had much to fear from other nations. This reality should not alter the meaning of this statute. Even in the early days, the Founders entrusted the interpretation and enforcement of the law of nations to the nascent federal courts.

To suggest that the courts are powerless to prevent abusive or politically-charged cases is disingenuous.[35] The courts are equipped with all the doctrinal machinery necessary to assure that only legal standards, not political judgments, are considered, including *inter alia* the political question doctrine, the act of state doctrine, and *forum non conveniens*.[36] These

[35] In ATCA litigation including *Filartiga, inter alia*, the Executive branch has assured the courts that proceeding with a case may be *more* consistent with the foreign policy interests of the United States than denying a remedy to the victims of human rights abuses. "[B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. . . When these conditions have been satisfied there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980), *reprinted in* 19 I.L.M. 585, 604 (1980)("Filartiga Memorandum").

[36] *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 248-249 (2d Cir. 1995) ("We do not read *Filartiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations"). *Accord Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (dismissed for failure to prove international standards); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th

doctrines erect a crucial fact-dependent screen to guarantee that politically sensitive cases are excluded.

The political question doctrine for example is typically used to dismiss lawsuits that improperly enmesh the judiciary in matters that have been textually committed to a coordinate branch of government or that require the application of standards that are not judicially manageable. *Baker v. Carr*, 369 U.S. 186, 217 (1962). In the context of human rights litigation under the ATCA, courts have carefully distinguished those cases that do implicate the political question doctrine from those that do not. In the words of the Second Circuit, "universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." *Kadic*, 70 F.3d at 249. The application of the political question doctrine in specific ATCA cases is a case-by-case issue for future decisions.

Rather than acknowledge the power and flexibility of these doctrines, the Petitioner and the government as *amicus curiae* assert as a constitutional matter that the Executive branch is in complete and exclusive control of international relations. But "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). "[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and [it] cannot shirk this

Cir. 1995) (same); *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098 (C.D.Cal., Apr. 15, 2003) (dismissed under political question doctrine); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D.Cal. 2002) (act of state doctrine barred adjudication of environmental tort and racial discrimination claims).

responsibility merely because our decision may have significant political overtones." *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986). In any event, there are times when the Executive branch has in its international relations recognized that the ATCA establishes both subject matter jurisdiction and a cause of action for serious violations of international law.[37]

This Court need not puzzle over the government's failure to acknowledge, let alone resolve, this discrepancy in its most recent filing. When an administrative agency construes an organic statute under which it exercises authority pursuant to congressional delegation, the Court will generally defer to that interpretation to the extent that it reflects some specialized expertise. *Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). But

> [when] the only or principal dispute relates to the meaning of the statutory term, the controversy must

[37]The *amicus* brief submitted by International Jurists sets forth numerous such statements. The government's most recent *amicus* brief also contradicts its own submissions in litigation under the ATCA. In *Filartiga v. Pena-Irala*, the government argued that the law of nations as it had evolved obligated every state to respect the right of its own citizens to be free of torture and that this obligation bound the United States as well, even in the absence of additional Congressional enactments. According to the government, the modern-day torturer had – like the pirate in the eighteenth century – become *hostis humani generis*, the enemy of all mankind, and therefore liable wherever he might be found. *See Filartiga* Memorandum, at 601-606. The United States took a similar position fifteen years later in *Kadic v. Karadzic*, 70 F . 3d at 240 ("The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law. *See Statement of Interest of the United States* at 5-13").

> ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by *judicial* application of canons of statutory construction.

Barlow v. Collins, 397 U.S. 159, 166 (1970) (emphasis supplied).

Statutes such as the ATCA are administered by the courts, not by the Justice Department, and whether a statute authorizes claims to be heard in federal courts is for the courts to determine.. Nor will the courts defer when the interpretation offered by the government is inconsistent with the facial requirements of the statute and legislative intent, and this is especially true if the government's interpretation changes over time. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 488 (1987); *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979).

Of course, neither the political question doctrine nor the act of state doctrine nor any of the other doctrines designed to avoid separation of powers concerns are at issue in this case, though Sosa and the government have had more than a decade to raise such issues. By this Court's standards, this case does not raise separation of powers concerns preventing the courts from compensating Dr. Alvarez for his injuries. Congress has authorized the federal courts to hear the claims Dr. Alvarez has made.[38] The fact that a Mexican national may be found liable for damages for Dr. Alvarez' abduction under the ATCA cannot plausibly be argued to put the Judiciary in conflict with the Executive branch of government. The fact that the courts reject the Government's view about this particular abduction or even the Government's litigation position on the scope of the

[38]As Justice Jackson emphasized in *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579, 637-38 (1952), presidential power is necessarily diminished when Congress has spoken.

law of nations in this case is not cause for any constitutional concern. Otherwise, the courts would simply be required to implement any particular Administration's view of international law in any case before them. At least since *Marbury v. Madison*, this Court's understanding of its constitutional duty is inconsistent with any contention that it must defer in all circumstances to Executive authority regarding the law of nations.

F. The War on Terrorism and the Prospect of Corporate Liability for Complicity in Human Rights Violations Abroad Are Irrelevant to This Case.

Petitioner and the government justify the blanket claim that ATCA cases are categorically nonjusticiable by implying that the ATCA poses an unacceptable risk to the war against terrorism. In particular, they raise the prospect of suits against this Nation's allies as an obstacle in the war on terrorism.[39] But this cannot happen: foreign governments – friendly or otherwise – can only be sued under the Foreign Sovereign Immunities Act,[40] and this Court has held that the ATCA does not provide subject matter jurisdiction for lawsuits against

---

[39] If ATCA cases truly posed such a threat, the government would surely have sought legislative reform of the ATCA in Congress. The absence of such action speaks volumes about the absence of any necessary conflict between the pursuit of human rights remedies and this country's national or economic security.

[40] 28 U.S.C. §§ 1330, 1601 *et seq*. Even lawsuits filed under the Foreign Sovereign Immunities Act are subject to significant restrictions. *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (Saudi Arabia immune from lawsuit filed by U.S. citizen alleging torture). Moreover, FSIA lawsuits are far more likely to raise sensitive political concerns than ATCA suits and FSIA lawsuits are routinely filed against this Nation's allies.

foreign governments. *Argentine Republic v. Amerada Hess Shipping Corp.*, 428 U.S. 428, 436 (1989). In support of its assertion that ATCA cases could have serious implications for the war on terrorism, the government cites *Al-Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), but the ATCA claim in that case was dismissed. Under the Court of Appeals decision in this case, ATCA actions cannot be brought against federal officials, but must be brought under the Federal Tort Claims Act, if at all. *Alvarez-Machain,* 331 F. 3d at 631.

There is considerable irony in the government's reliance on Judge Bork's concurrence in *Tel-Oren* that interpreted the ATCA to *deprive* a plaintiff of a remedy for a terrorist attack. In the twenty years since *Tel-Oren* was decided, and especially in the aftermath of the September 11th attacks, which surely qualify as crimes against humanity, the law of nations has developed to the point that the victims of terrorist attacks could use the ATCA to seek compensation from the terrorists, including those aiders and abettors of terrorism who may use the corporate form. *See Amicus of September 11th Families*. Of course, this case does not require this Court to recognize a claim under ATCA for terrorist attacks any more than it requires a decision about the legality of abducting alleged terrorists as part of the war against terrorism.

Equally irrelevant to this case are the circumstances under which a corporation may be found liable for human rights abuses. No part of Dr. Alvarez' case turns on any issue of corporate complicity for international law violations. Moreover, contrary to the dire warnings of some of Petitioner's *amici*, no court has ever held a corporation liable for human rights abuse simply because it was doing business at a time and place when abuses were occurring generally.

A variety of cases are currently pending in federal and state courts which draw on the centuries-old tradition of imposing individual liability for certain violations of

international law.[41] But many ATCA corporate cases have been dismissed, either because plaintiffs could not establish a violation of international law, *see e.g., Flores*, *supra*, or because of the political question doctrine: especially in the context of cases arising out of World War II against Japanese and German government entities or corporations, the treaties ending the war have been interpreted to render additional compensation or reparations a matter for the Executive branch. *See, e.g., Hwang Geum Joo v. Japan*, 332 F,3d 679 (D.C. Cir. 2003). If anything, the corporate cases that have actually been decided reaffirm that

[41] Article IV of the Genocide Convention, for example, requires that persons committing genocide be punished, "whether they are constitutionally responsible rulers, public officials or private individuals." Convention for the Prevention and Punishment of the Crime of Genocide, art. IV, Feb. 23, 1989, 78 U.N.T.S. 277. Common Article 3 of the Geneva Conventions of 1949, similarly bind non-state actors when they are parties to an international armed conflict, and the anti-slavery regime is similar in not requiring state action. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Feb. 2, 1956, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Feb. 2, 1956, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Feb. 2, 1956, 6 U.T.S. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287. These regimes do not distinguish between natural and juridical individuals, and international law would not protect a corporation that engaged in the slave trade or committed acts of genocide, or provided corporate cover for a piracy ring.

the courts have the necessary tools to distinguish non-justiciable or frivolous cases from those that are meritorious. This case is not a suitable vehicle for this Court's consideration of the ATCA in a corporate context.[42]

II. A *JUS COGENS* VIOLATION IS SUFFICIENT BUT NOT NECESSARY TO SATISFY THE REQUIREMENTS OF THE ALIEN TORT CLAIMS ACT.

Petitioner offers only a cursory answer to the second question on which *certiorari* was granted, namely whether the category of claims actionable under the ATCA is limited to violations of *jus cogens*.[43] The Court should decline any invitation to redraft the statute by raising the threshold above

[43] Under Sup. Ct. Rule 14(1)(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Petitioner reframes the question from his *certioriari* petition and responds that a cause of action under the ATCA "should extend only to those norms to which the United States has assented," *Pet. Brf.* at (i), an argument that has nothing to do with *jus cogens* norms. The meaning of *jus cogens* is described in Section 102 of the *Restatement (Third) of Foreign Relations Law*:

> Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation, and prevailing over and invalidating international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.

American Law Institute, *Restatement (Third) of Foreign Relations Law*, §102, cmt. k. *See* Vienna Conv. on the Law of Treaties, May 23, 1969, Art. 53, 1155 U.N.T.S. 331, 344.

the already demanding requirement that the tort be – in the words actually used by Congress – in violation of "the law of nations or a treaty of the United States." A customary norm need not qualify as *jus cogens* in order to be justiciable generally[44] or specifically under ATCA. The standard for finding that a norm is part of the law of nations is demanding and more than sufficient in theory and in practice, to weed out insubstantial claims.

The lower courts have already noted the distinction between the "law of nations" and *jus cogens*. In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1991), for example, the court determined that the "law of nations" (or customary international law) arises out of the "general and consistent practice of states followed by them from a sense of legal obligation," *id.*, at 715 (citing *Restatement (Third)* §102(2)), and defined the process by which it will determine whether a purported norm of customary international law satisfies that high standard. There is nothing in ATCA's language that requires or allows the higher and more controversial *jus cogens* standard.

Sosa's argument is also inconsistent with the decisions of every circuit court of appeals to address the issue, each of which has defined the category of actionable claims under the ATCA without any necessary reference to the *jus cogens* doctrine. "Actionable violations of international law must be of a norm that is specific, universal, and obligatory." *In re Estate of Ferdinand E. Marcos*, 25 F.3d 1467, 1474 (9th Cir. 1994) ("*Estate II*"). The "specific, universal, and obligatory" standard allows the court to distinguish between genuinely

[44] *See, e.g., The Paquete Habana*, 175 U.S. 677 (1900), in which the government's interference with domestic coastwise fishing vessels in time of war violated an established customary international norm, but there was no showing that it was a *jus cogens* norm.

customary international law and merely idiosyncratic or aspirational norms. *See, e.g., Flores v Southern Peru Copper Corp., supra* (environmental claims); *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986). For example, the mere fact that many or even all nations consider an act a violation of their domestic law does not suffice to create a principle of customary international law.[45] Where there is diversity of opinion internationally (e.g. freedom of expression norms) the "specific, universal, and obligatory" test is unlikely to be satisfied. *Guinto v. Marcos*, *supra*. Interpreting ATCA to apply to violations of the law of nations, in accordance with its actual words, has not created nor will it create any flood of ATCA cases.

III. RESPONDENT'S ABDUCTION WAS AN ARBITRARY ARREST UNDER INTERNATIONAL LAW

Respondent's abduction was an arbitrary arrest under well-established international law.[46] Indeed, the principle that an arrest without lawful authority is unlawful dates back at least as far as the Magna Carta.[47] The courts below determined as a matter of fact that Respondent was seized in his office at night by armed, unknown men, acting without legal authority, dragged to a waiting car, and detained against his will pursuant

[45] *See, e.g., Benjamins v British European Airways* 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 US 1114 (1979).

[46] Dr. Alvarez' abduction also violated the customary norm prohibiting transborder abduction. Dr. Alvarez discusses those norms in detail in his brief in *United States v Alvarez-Machain*, No 03-485, §I (C)(1).

[47] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963).

to no legal authority. His family was not informed of his whereabouts for days. There can be no serious dispute that this treatment violated Respondent's right to be free of arbitrary arrest and detention, a right recognized in virtually every multilateral and regional human rights treaty,[48] affirmed in the national constitutions of the majority of states in the world.[49]

The government of the United States has drawn on these principles before the International Court of Justice and

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[48] Article 9 of the Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), for example provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." Article 9 of the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, *entered into force* March 23, 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, similarly provides that "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." *See also* Article 5 of the European Convention; Article 7(3) of the American Convention; Article 6 of the African Charter of Human and People's Rights.

As noted in the Human Rights Organizations Amicus Brief, § III, not one of the international texts establishing this norm provides that an arbitrary detention is only wrongful if it is "prolonged." *See Paul v. Avril*, 901 F. Supp. 330, 336 (S. D. Fla. 1994) (awarding damages to an individual detained for less than ten hours). The courts below were correct in the limited weight it gave to the *Restatement's* anomalous departure from the international standard. Section 702(e) of the *Restatement (Third)* defines "prolonged arbitrary detention" as a violation of international law, and the commentary to that section provides that "arbitrary detention violates customary law if it is prolonged and practiced as state policy."

[49] See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 325, 360– 61 (1993).

prevailed in *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, 1980 I.C.J. 42 at ¶ 91. The courts that have addressed this issue have repeatedly held that the arbitrary arrest and detention violate international law.[50] In *Martinez v. City of Los Angeles*, 141 F.3d at 1384, for example, the court found a "clear international prohibition against arbitrary arrest and detention" and established that the ATCA reaches such conduct. Under *Martrinez*, "detention is arbitrary if 'it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Id.*, *citing Restatement (Third) of the Foreign Relations Law of the United States* §702 cmt. h (1987).

After investigating Respondent's abduction, the United Nations Working Group on Arbitrary Detention, established by the U.N. Human Rights Commission, concluded that

> [t]he detention of Humberto Alvarez-Machain is declared to be arbitrary, being in contravention of article nine of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights and principle two of the body of principles [governing arbitrary detention] adopted by the [United Nations] General Assembly in resolution 43/173....

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[50] *See, e.g.*, *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Siderman de Blake v. Argentina*, 965 F.2d at 717.; *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1395, 1397 (5th Cir. 1985); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Forti v. Suarez Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

Report of the Working Group on Arbitrary Detention, U.N. Commission on Human Rights, 50th Sess., Agenda Item 10, at 140, U.N. Doc. E/CN.4/1994/27 (1993), at 139-40.

The lower courts were correct in finding that Respondent's abduction was lawless and constituted arbitrary arrest under international law. Any other finding is irreconcilable with the core concept of the rule of law recognized in Anglo-American jurisprudence for centuries and embraced by international human rights law.

CONCLUSION

For all these reasons the judgment should be affirmed.

Dated: February 27, 2004

Respectfully submitted,

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March 16, 2004

VIA FACSIMILE

FOR ARGUMENT

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Re: Sosa v. Alvarez-Machain, No. 03-339

Dear Mr. Suter:

There is an error on page 45 of Respondent's Brief in the above-entitled case. At the end of the fourth line on that page there is a footnote number 42 without any footnote attached to it. We did not intend to have a footnote there and the fact that the number remained is a word processing error on our part.

We apologize for any inconvenience this error may have caused.

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Sincerely,

Paul Hoffman
Counsel for Respondent

cc: Counsel for Petitioners

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No. 03-339

In the Supreme Court of the United States

JOSÉ FRANCISCO SOSA, PETITIONER

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONER

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REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONER

Section 1350 is solely a grant of jurisdiction: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. 1350. That means that, while Section 1350 has ensured since its original enactment as part of the Judiciary Act of 1789 that federal courts are open to the type of civil actions described by the provision, an alien must point to some *other* Act of Congress or treaty of the United States that creates a private right of action under federal law that may be brought under Section 1350. Not until 190 years after its enactment did any federal court definitively interpret or rely on Section 1350 as anything more than a jurisdictional grant.

Section 1350—which speaks in terms of "jurisdiction," and always has been surrounded by other jurisdictional provisions—does not contain any rights-creating language and therefore does not itself create any cause of action. That was as true in 1789 as it is today. Nor does Section 1350 permit federal courts to infer private rights of action directly from sources of customary international law (or to create a federal

common-law cause of action that in turn finds its content in customary international law). This Court has repeatedly recognized that causes of action generally must be created by Congress. That established principle has particular force in the context of the law of nations. Any other understanding would turn on its head the Constitution's separation of powers between the judiciary and the political branches in the vitally important realm of foreign affairs.

The contrary construction of Section 1350 adopted by the Ninth Circuit and urged by respondent is incompatible with the text and history of that provision; gives the courts, rather than the political branches, the primary role for defining and enforcing violations of international law; requires courts to develop an entirely judge-made legal regime to adjudicate Section 1350 actions; and, in just over two decades, has thrust the federal courts into a revolutionary role of arbitrating sensitive human rights disputes arising in foreign lands. That construction should be rejected and the Court should hold that Section 1350 is just what it says: a jurisdictional grant.

I. SECTION 1350 IS SOLELY A GRANT OF FEDERAL JURISDICTION

1. Respondent, like the Ninth Circuit, construes Section 1350 not only to confer jurisdiction over the civil actions it describes, but also to supply a boundless cause of action on behalf of "aliens who are victimized by tortious violations of international law." Resp. Br. 9, 33-34. As the United States has explained (U.S. Br. 11-24), that position cannot remotely be squared with the language of Section 1350 under the principles that this Court customarily applies in determining whether Congress has created a "private right[] of action to enforce federal law." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Nor does it square with the settled understanding that "[t]he Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from *other*

sources." *Montana-Dakota Co.* v. *Northwestern Pub. Serv.*, 341 U.S. 246, 249 (1951) (emphasis added).[1]

a. The terminology that respondent uses to describe Section 1350 itself demonstrates the extent to which his ambitions for Section 1350 exceed its text. Respondent—like the

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[1] Respondent states (Br. 30, 40 n.37) that the United States has taken contradictory positions on the scope of Section 1350. In *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the United States filed a brief supporting the result reached by the court of appeals in that case, albeit without specifically addressing the source of a cause of action. Since then, however, the United States has maintained a contrary construction of Section 1350 in other circuits and in this Court. In *Trajano* v. *Marcos*, 978 F.2d 493 (9th Cir. 1992), cert. denied, 508 U.S. 972 (1993), the first case after *Filartiga* in which the United States submitted its views on Section 1350, the United States argued that the statute is purely jurisdictional and does not supply a private right of action for alleged violations of international law in other countries. Likewise, in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the United States maintained the same position. See 87-1372 U.S. Br. Pet. Stage 13 n.11 ("[Section 1350] (like the federal question statute) is only jurisdictional in nature" and "does not create a cause of action in favor of an alien for a violation of the law of nations"); see also 87-1372 U.S. Br. 27-28 n.26. In *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996) the United States filed a statement of interest arguing that the district court erred in ruling that Section 1350 was inapplicable because the defendant was not a state actor. The United States did not disavow its position in *Trajano* and *Amerada Hess* on the scope of Section 1350, but instead simply stated (at 2) that it accepted *Filartiga* "as the law of this Circuit and the starting point for the necessary analysis." In June 2003, the United States filed an amicus brief in *Doe I* v. *Unocal Corp.*, Nos. 00-56603 & 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003), vacated & reh'g granted (argued June 11, 2003), taking the same position that the government took in *Trajano* and *Amerada Hess* on the scope of Section 1350. Furthermore, notwithstanding the position that the United States took in *Filartiga*, in the light of the litigation spawned by *Filartiga* and the reactions conveyed to the State Department from other countries affected by such litigation, see U.S. Br. 42-45, the United States (like this Court) is now in a better position to evaluate the serious practical and separation-of-powers problems of the *Filartiga* approach.

courts and commentators that have adopted his view—refers to Section 1350 as the "Alien Tort Claims Act." But respondent cannot convert the bare terms of Section 1350 into an Alien Tort Claims Act simply by labeling it as such. That is certainly not the title that Congress gave to Section 1350, either when it first enacted the provision as Chapter 20, § 9, 1 Stat. 77, of the First Judiciary Act or when it recodified it in 1911 or 1948 in chapters addressing the jurisdiction of district courts. See U.S. Br. 15-16. Moreover, any comparison between the jurisdictional language of Section 1350 and the rights-creating language of the "Federal Tort Claims Act," see 28 U.S.C. 2671-2680—which in its entirety also addresses, *inter alia*, exhaustion of remedies, availability of punitive damages, and choice of law—underscores just how much respondent's position would require the Court to engraft onto Section 1350 to create an "Alien Tort Claims Act."

b. Respondent attaches significance to Section 1350's reference to a "violation." See Resp. Br. 13 ("[T]he 'violation' language of section 1350 may be interpreted as explicitly granting a cause of action even if the 'arising under' language of section 1331 cannot.") (internal quotation marks omitted). That argument is refuted by *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). In *Touche Ross*, the Court held that Section 27 of the Securities Exchange Act of 1934 (1934 Act), 15 U.S.C. 78aa, only "grants jurisdiction to the federal courts" and "creates no cause of action of its own force and effect," 442 U.S. at 577, even though it grants district courts "exclusive jurisdiction of *violations* of this chapter or the rules and regulations thereunder * * * ," 15 U.S.C. 78aa (emphasis added). See U.S. Br. 12-13. Section 1350's bare reference to "tort" does not suffice for the same reason that its reference to "violation" does not. Although there is some debate as to what "tort" meant in 1789, at best the reference to "tort" could be read to refer simply to a specific type of violation and not a grant of substantive rights.

c. Respondent states (Br. 33) that "the difference between the vocabulary of rights in 1789 and the approach embodied in *Sandoval* cautions against using the convenient analysis offered by Petitioner." However, *Sandoval* is more than "convenient analysis"; it is the law that governs whether a statute, including a statute enacted while a different view may have held sway, creates a cause of action. *Sandoval*, 532 U.S. at 288. In any event, as the United States has explained (U.S. Br. 15), the First Congress knew full well how to create private rights of action when it wanted to. Furthermore, no federal court inferred a cause of action from the language of Section 1350 until *after* this Court had itself "sworn off the habit of venturing beyond Congress's intent" in determining when a statute creates private rights. *Id.* at 287. Those two facts strongly counsel in favor of giving effect to the plain language of Section 1350's *jurisdictional* grant. U.S. Br. 19-20.

d. Respondent's effort to account for the Torture Victim Protection Act (TVPA), 28 U.S.C. 1350 note, is similarly unavailing. See Resp. Br. 34-37. The legislative history of the TVPA cannot supply any cause of action that Section 1350 itself does not. U.S. Br. 23-24. Moreover, although respondent attempts (Br. 36) to draw "similarities between [Section 1350] and the TVPA," the *contrast* between Section 1350's "jurisdiction" language and the TVPA's "establishment of civil action" language (and the accompanying specification of a statute of limitations and exhaustion requirement) underscores that Section 1350 is purely jurisdictional. See U.S. Br. 21. At the same time, if Section 1350 supplies the cause of action inferred by the Ninth Circuit, then the explicit cause of action created by the TVPA for the specified offenses of "torture" and "extrajudicial killing" not only was unnecessary for aliens, but the TVPA—by including an exhaustion requirement and statute of limitations not set forth in Section 1350—makes it *more* difficult to recover for the most despicable type of conduct—torture and extrajudicial

killing—relative to less egregious transgressions governed by Section 1350.

2. Respondent and his amici devote considerable effort to reconstructing a history of Section 1350 that supports their far-reaching interpretation of that statute. But no amount of historical research or speculation can overcome the fact that Section 1350 in its plain terms confers jurisdiction, and not a cause of action. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (when a statute's language is plain, the "sole function of the courts" is to give effect to its terms). In any event, although the origins and purpose of Section 1350 are shrouded in academic debate, what *is* known about the 215-year history of the provision directly refutes respondent's position in the following respect: Section 1350 was only rarely referred to in judicial decisions during the first 190 years of its existence, and not until the 1980s did any federal court discover a cause of action in Section 1350's jurisdictional terms. See U.S. Br. 19-20. That fact is the most clear and therefore compelling facet of Section 1350's past, and it points to the conclusion that the cause of action inferred by courts only in the past two decades never existed in the first place. See *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370 (1959).

3. Respondent argues (Br. 4) that a plain-meaning construction of Section 1350 "renders it meaningless from its inception." But Congress did not enact a general federal question statute until 1875 (Act of Mar. 3, 1875, ch. 137, §1, 18 Stat. 470), and from 1789 until then Section 1350 ensured that the federal trial courts had jurisdiction over a significant class of potential civil actions by an alien.[2] Moreover, as explained by amici National Foreign Trade Council et al. (NFTC), when Congress passed the provision there

[2] The First Judiciary Act created federal alienage jurisdiction, but imposed a $500 amount-in-controversy requirement on the exercise of that jurisdiction, which would have effectively barred many controversies that might otherwise be covered by Section 1350.

were several ratified treaties already in existence that conferred private rights for violations of the treaty provisions. One example is the Treaty of Amity and Commerce, July 9, 1785, U.S.-Prussia, art. 15, 8 Bevans 78, 83, which was designed to protect each nation's ships from the other nation's privateers, and created a private right for individuals injured by a violation of the treaty to be compensated in "damages and interest." See 2 *Treaties & Other Int'l Acts of the United States of America* 1 (Hunter Miller ed. 1931) (*Treaties*) (reproducing treaties from 1776-1818); NFTC Br. 26-27 (citing additional examples).[3]

II. CUSTOMARY INTERNATIONAL LAW DOES NOT SUPPLY A BASIS FOR INFERRING A PRIVATE RIGHT OF ACTION

Because Section 1350 is purely jurisdictional, respondent must identify a private right of action "arising from other sources." *Montana-Dakota Co.*, 341 U.S. at 249. As this Court has made clear in cases like *Sandoval*, the only potential source of a private right under federal law is an Act of Congress or self-executing treaty of the United States. Courts have no license to infer private rights of action directly from the indeterminate body of customary international law or, for that matter, to create federal common-law causes of action that rely on customary international law for their content.

[3] That those treaties all provided a right to damages for tortious wrongs committed by privateers is consistent with one historical theory that the language that became Section 1350 was addressed solely to the law of prize and was designed primarily to preserve a degree of concurrent state court jurisdiction over claims that might otherwise fall within the exclusive federal jurisdiction governing admiralty and maritime. See Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445 (1995). Under this view, the provision's rare usage would be consistent with the abolishment of privateering. *Id.* at 462. Section 1350 also may have provided an additional source of potential federal jurisdiction in such cases. See U.S. Br. 17.

1. Although respondent acknowledges that Congress may "specify" what violations of international law are privately actionable and may override or "correct" judicial decisions it deems erroneous, he maintains that federal courts may infer private rights of action from customary international law when Congress has not acted. Resp. Br. 30; see *id.* at 31 ("[E]ven when Congress is silent," courts may infer private rights of action under customary international law). That understanding is profoundly mistaken.

The Constitution gives Congress, not the courts, the authority to create causes of action. That principle applies with even greater force in contexts that implicate foreign affairs because the Constitution commits to the political branches, not the courts, the responsibility for managing the Nation's foreign affairs. For example, Article I, § 8, Cl. 10—which grants Congress the authority to "define and punish * * * Offenses against the Law of Nations"—"makes it abundantly clear that Congress—not the Judiciary—is to determine, through legislation, what international law is and what violations ought to be cognizable in the courts." *Al Odah* v. *United States*, 321 F.3d 1134, 1147 (D.C. Cir.) (Randolph, J., concurring), cert. granted, 124 S. Ct. 534 (2003) (Nos. 03-334 & 03-434); see U.S. Br. 32. The TVPA underscores that Congress knows how to exercise that power. U.S. Br. 34. Likewise, the Constitution (U.S. Const. Art. II, § 2, Cl. 2) vests in the political branches, not the courts, the authority to enter into treaties or international agreements with other nations—and to define any privately enforceable features of those agreements. See U.S. Br. 36.

Respondent's position that courts may infer private rights of action either directly from customary international law or indirectly under the guise of federal common-law decision-making would eviscerate those fundamental textual constitutional commitments. In arguing that he has stated an actionable claim for damages, respondent relies on the same sources of customary international law as the Ninth Circuit. See Resp. Br. 48 n.48. They include: a non-binding U.N.

resolution (the Universal Declaration of Human Rights); a regional convention to which the Senate has refused to give its consent (the American Convention on Human Rights); two other regional conventions governing signatory nations in Europe and Africa; and a non-self-executing treaty that the Senate ratified only with the express understanding that it did *not* create private rights of action (the International Covenant on Civil and Political Rights (ICCPR)). See U.S. Br. 25-27. As Judge Randolph has observed, inferring private rights of action from such sources is fundamentally "anti-democratic and at odds with principles of separation of powers." *Al Odah*, 321 F.3d at 1148 (concurring).

Indeed, respondent's position not only would grant authority to the courts to engage in a function that the Constitution vests in the political branches, but it would permit the courts effectively to *nullify* the actions of the political branches in the realm of foreign affairs. In deciding whether to ratify a human rights treaty or convention, there often is extended debate in the political branches on whether to make such provisions self-executing or whether to express conditions or reservations on the United States' ratification of an international agreement. See U.S. Br. 37-38; Br. for Professors of Int'l Law et al. 19-20 & n.16. In ratifying the ICCPR, for instance, the Senate and the Executive specifically "clarified that the Covenant will *not* create a private cause of action in U.S. courts." S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 19 (1992); U.S. Br. 37. However, under respondent's view (Br. 48 n.48), the Ninth Circuit nonetheless appropriately relied on the ICCPR (along with the other provisions discussed above) in finding an actionable violation of customary international law under Section 1350.

2. Respondent defends that counterintuitive and anti-democratic result by arguing that, when Section 1350 was first enacted as part of the Judiciary Act of 1789, there was no understanding that the enforcement of international law "required further definition by statute." Resp. Br. 11; see *id.* at 14, 30-31. To begin with, even if that were an accurate

characterization of the First Congress's understanding, that historical understanding would supply no basis for inferring a private right of action from Section 1350's jurisdictional language *more than 200 years later*, when this Court has made unmistakably clear that "private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. Nor would it provide any basis to interpret Section 1350's jurisdictional grant as a grant of federal common-law decisional authority to the courts.

In any event, the available evidence indicates that the founding generation did not share respondent's view that the courts were free to entertain actions to enforce offenses against the law of nations as they saw fit, and that there was no need for any specific "statutory authorization to sue." Resp. Br. 11. As petitioner Sosa has explained (Pet. Br. 20-22), in 1781 the Continental Congress was concerned about the ability of existing legal institutions in the States to adjudicate and defuse sensitive international disputes—such as assaults on ambassadors in this country—by providing redress for individual wrongs against the law of nations. The Continental Congress responded by passing a resolution calling on "the legislatures of the several states" not only to enact criminal penalties for offenses against the law of nations, but also "to *authorise suits* to be instituted by damages for the party injured" for such offenses. 21 *Journals of the Continental Congress 1774-1789*, at 1136-1137 (Gaillard Hunt ed. 1912) (reproduced at Pet. Br. 3a-4a). There would have been no need for state legislatures "to authorise" such damages actions if courts were free to infer such a private right of action directly from the law of nations.

The following year, Connecticut enacted a statute "securing to Foreigners in this State, their Rights, according to the Laws of Nations, and to prevent any Infractions of said Laws." Acts and Laws of the State of Connecticut, in America 1784 (reproduced at Pet. Br. 5a-6a). In addition to creating certain criminal offenses for violation of the law of nations (such as infractions against ambassadors), the

statute employed rights-creating language to authorize suits by aliens against persons who damage their "Persons or Property" and stated that such persons "shall be liable to pay and answer all such Damages as shall be occasioned thereby." *Ibid.* Oliver Ellsworth—who drafted the First Judiciary Act—was a member of the Connecticut legislature that passed that act, as well as the Continental Congress that passed the 1781 resolution that led to the Connecticut act. Although Connecticut was the only State to respond to the 1781 resolution, its response bolsters the evidence that the founding generation—not to mention the author of the First Judiciary Act—appreciated that a legislative enactment was needed to create a private right of action to recover redress for a violation of the law of nations, and knew how to draft a statute employing rights-creating language.[4]

Similarly, in his *Commentaries*, Blackstone observed that the "law of nations" in its broadest form is "a system of rules, deductible by natural reason, and established by universal consent among the civilized inhabitants of the world." 1 *Commentaries* *66. However, he also explained that "acts of parliament * * * have from time to time been made to *enforce* this universal law, or to *facilitate the execution of it's decisions*." *Id.* at *67 (emphasis added); see also *id.* at *68 (discussing the three "principal offenses against the law of nations, *animadverted on as such by the municipal laws of England*") (emphasis added). The First Congress likewise enacted positive laws—including those punishing assaults on ambassadors—in order to "enforce" the law of nations in the

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[4] Both the 1781 resolution and the 1784 Connecticut statute contained separate provisions that (1) conferred jurisdiction on the courts to hear cases alleging violations of the law of nations, and (2) granted a private right of action to recover damages for any injuries suffered as a result of such a violation. See Pet. Br. 4a, 6a. Section 1350 is modeled on the first (jurisdictional) clause, and does not contain the second (rights-creating) clause.

new Republic, "facilitate the execution of its decisions," and ensure "adequate punishment" for its violation. U.S. Br. 33.

Nor is Attorney General Bradford's 1795 opinion to the contrary. See Resp. Br. 14-15. That opinion, written in connection with a diplomatic protest by the Minister of Great Britain, was addressed to a incident that occurred in 1794 when an American slave-trader "voluntarily joined, conducted, aided, and abetted" a French privateer fleet in attacking the British colony of Sierra Leone, Africa, "plundering and destroying" their property. 1 Op. Att'y Gen. 57, 58 (1795); see William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 502-503 (1986). Attorney General Bradford observed that the alleged actions "against such as are in amity with us" were "in a violation of a treaty" between the United States and Great Britain. 1 Op. Att'y Gen. at 58. Article 7 of the Treaty of Peace of September 3, 1783, provided for peace between Great Britain and the United States and their subjects and citizens, although it did not specify a remedy for a breach. 2 *Treaties* 155 (reproducing treaty). Article 19 of the Treaty of Amity, Commerce, and Navigation between the United States and Great Britain, which was signed on November 19, 1794 (T.S. No. 105), and was before the Senate for its advice and consent at the time of Attorney General Bradford's opinion, provided that the privateers of one nation "shall forbear doing any Damage to those of the other party," and "shall also be bound in their Persons and Estates to make satisfaction and reparation for all Damages, and the interest thereof, of whatever the nature said damages may be." *Id.* at 259 (same). There is no record of any federal action being brought arising out of these incidents. In any event, Attorney General Bradford describes the provision that became Section 1350 as providing "jurisdiction" to the courts, not as a source of causes of action, and nothing in his

opinion supports respondent's sweeping view that federal courts may infer a cause of action under Section 1350 for asserted violations of customary international law norms that have not been adopted by the political branches.

3. Respondent argues that statements in *The Paquete Habana*, 175 U.S. 677 (1900), support the conclusion that courts may define the "scope of customary [international law] norms without the authorization of Congress." However, as the United States explained in its opening brief (U.S. Br. 34-35), nothing in *The Paquete Habana* or other cases from that era holds that federal courts are free to infer private rights of action directly from customary international law. Indeed, the Court's observation in *The Paquete Habana* that "[i]nternational law is part of our law" was followed by language acknowledging that a court's reference to international law cannot override a "controlling executive or legislative act." 175 U.S. at 700. As the United States has explained, in holding that courts may infer private rights from customary international law, the Ninth Circuit's decision in this case has precisely that effect. See U.S. Br. 35-36.

Moreover, although it may be appropriate in certain situations for a court to consult international law as a secondary consideration in a case properly before it, see, *e.g.*, *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), no decision of this Court supports the proposition that a court may infer a private right of action directly from customary international law as a matter of first principles. *The Paquete Habana* only observed that courts could look to international law when a matter was "duly presented" for decision. 175 U.S. at 700. The question at issue in that case—whether fishing vessels could be condemned under the law of prize, U.S. Br. 35 n.10—was "duly presented" by virtue of the lower court's prize jurisdiction, and not because customary international law provided a cause of action of its own force. Indeed, this Court has long recognized that even a ratified treaty does not necessarily create privately en-

forceable rights and that, instead, "the legislature must execute the [treaty] before it can become a rule for the Court." *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). There is no basis in our constitutional scheme for the Court to adopt a more relaxed approach with respect to the less concrete body of customary international law.

Respondent's reliance on statements from *The Paquete Habana* also fails to account for this Court's decision in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). *Erie* laid to rest the common law role that the federal courts had sometimes played in civil suits. In the aftermath of *Erie*, this Court has expressed a much different understanding. See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981). Accordingly, even if respondent and his amici were correct that federal courts would apply international "law merchant" in federal common-law contract actions concerning international contracts prior to *Erie*, that does not mean that such actions somehow survive *Erie*, while ordinary domestic federal common-law contract actions do not.[5] In *Sandoval*, this Court admonished that "[raising] up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." 532 U.S. at 287. Although *Sandoval* did not involve

[5] Respondent and his amici acknowledge that the practice of bringing common-law criminal actions to redress violations of the law of nations was, if anything, more established in 1789 than any practice of seeking civil redress for such violations. See, *e.g.*, Resp. Br. 21. The notorious attacks on ambassadors that occurred in the framing period were redressed by common-law criminal actions in state court, rather than by civil redress. See *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (1784); *Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands*, 34 J. Cont. Cong. 109, 111 (1788). (Arguably, it was the lack of legislative authorization to bring such actions for civil redress that led to the 1781 resolution of Continental Congress discussed above.) Yet no one would contend that such actions, or common-law criminal actions in general, survived this Court's decision in *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812).

an attempt to "raise up" a cause of action from international law, given the clear textual commitment of the authority to define and manage the law of nations and foreign affairs to the political branches, such conjuring is, if anything, even more problematic in the context of Section 1350.[6]

To be sure, "[a] narrow exception * * * is found in admiralty." *Northwest Airlines*, 451 U.S. at 95. However, there is no basis for enlarging the "narrow" lawmaking role that federal courts have played in admiralty to customary international law *en masse*. As the United States has explained, the common law-type role played by the federal courts in admiralty is grounded in the textual grant of authority in Article III, § 2 of the Constitution and the 1000-year history of admiralty law that preceded it. See U.S. Br. 29-31; 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-1, at 166-168 (3d ed. 2001) (quoting *The Ship Catharina*, 23 F. Cas. 1028 (D. Pa. 1795) (N0. 13,949)). As the Fourth Circuit recently observed, "the Constitution conferred admiralty subject matter jurisdiction on federal courts and, by implication, authorized the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction." *R.M.S. Titanic, Inc.* v. *Haver*, 171 F.3d 943, 961, cert. denied, 528 U.S. 825 (1999). There is no comparable grant of authority in Article III with respect to the "law of nations" in general and, to the contrary, the only reference to the law of nations in the Constitution is in the define and punish clause in

[6] As the United States has explained, the effect of this Court's statement in *The Paquete Habana* that "international law is part of our law," has been seriously debated in the wake of *Erie* and the limited role that *Erie* allows for any general federal common law. See U.S. Br. 35 n.11; see also *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1153-1154 n.4 (7th Cir. 2001). In any event, because even this Court's pre-*Erie* statements about international law do not support respondent's argument that federal courts may assume the role of inferring causes of action directly from customary international law, there is no need for the Court to revisit those pre-*Erie* statements in this case.

Article I (§ 8, Cl. 10). Nor is there any comparable historical practice of courts fashioning rights of action and applying the law of nations in general.[7]

Respondent's analogy to admiralty and maritime law is apt in one respect. If this Court embraces the Ninth Circuit's decision in this case, then federal courts will have to develop an entire common-law regime to adjudicate Section 1350 litigation akin to the extensive law of admiralty, no doubt with the need for frequent clarification by this Court. Section 1350—which merely grants jurisdiction to the federal courts and contains just 33 words—does not answer any of the questions that a court will necessarily confront in adjudicating a claim brought under the cause of action inferred by the Ninth Circuit. As a result, as respondent readily and necessarily concedes, courts will have to "derive federal common law rules to govern such issues as statutes of limitation, standing to sue, exhaustion of remedies, third party complicity and the like." Resp. Br. 32; see also *id.* at 29.

4. In response to the grave separation-of-powers concerns that stem from respondent's construction of Section 1350 (see U.S. Br. 40-46), respondent states that "[t]he courts are equipped with all the doctrinal machinery necessary to assure that only legal standards, not political judgments, are considered." Resp. Br. 38; see *id.* at 38-42. That assessment is, at a minimum, highly optimistic. But in any event, the existing "machinery" has not proved adequate to alleviate the international tensions that already have been created by the Section 1350 litigation that has followed in the

[7] Although respondent suggests that the Framers' intent in fostering uniformity in the interpretation of the law of nations supports his view of Section 1350, a provision granting federal courts *concurrent* jurisdiction (as Section 1350 originally did) seems ill-suited to ensuring uniformity. Moreover, the records of the Constitutional Convention establish that the Framers—indeed, Madison himself—acted to instill uniformity by granting Congress the power "to define" the law of nations. See U.S. Br. 32-33.

wake of *Filartiga*. See U.S. Br. 43-45.[8] If this Court endorses the Ninth Circuit's expansive construction of Section 1350 in this case, the volume of Section 1350 litigation in the federal courts (which is now confined primarily to the Second and Ninth Circuits) will in all likelihood grow substantially.

Section 1350 also may interfere with the political branches' own efforts to promote human rights. The United States Government is committed to improving human rights practices around the world and uses a variety of measures to accomplish that goal, including military operations, treaties, formal condemnation, economic sanctions, and less severe penalties and incentives. As this Court has recognized, the political branches must have the flexibility to "calibrate" those measures to accomplish foreign policy objectives. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 375-376 (2000); see *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374 (2003). Moreover, the political branches, which deal with foreign governments on the *whole range* of issues, are in a unique position to gauge whether raising human rights issues would interfere with other foreign policy objectives that are simultaneously being pursued. Section 1350 litigation brought by individuals or groups focused on a *single* issue may interfere with the efforts of the political branches to effectuate such foreign policy. For example, the existence of Section 1350 litigation may offend foreign governments or officials at the precise moment when the political branches of this country are trying to encourage them to reform abusive practices or are pursuing needed cooperation on an alternative front. See Br. for Commonwealth of Australia et al. 26-27. Similarly, the threat of Section 1350 litigation may deter U.S. or foreign investment in countries that the political branches here have determined would be

[8] For instance, the political question doctrine is rarely invoked and, as even the Second Circuit candidly observed, "it would be a rare case in which the act of state doctrine precluded suit under section 1350." *Kadic*, 70 F.3d at 250.

conducive to positive reform in those countries. See U.S. Br. 43-45 & n.14; NFTC Br. 13-19.

To be sure, many Section 1350 actions are aimed at human rights abuses that are despicable and that already have been publicly or privately condemned by the United States Government. However, the variety of policy choices that the political branches of the United States Government routinely make in establishing and attempting to effectuate the Nation's foreign policy with respect to the foreign countries or actors responsible for such abuses makes this an area that is uniquely ill-suited for judicial involvement, oversight, or second-guessing. And these difficult and often nuanced foreign policy choices are precisely the sort of judgments that the Constitution commits to the political branches in conducting the Nation's foreign affairs.

5. Ironically, although the arguments made by respondent and his amici are grounded on a view that international law must play a preeminent role in the United States courts, the boundless right of civil redress for violations of customary international law that respondent infers from Section 1350 has no parallel in the domestic law of any other country of which the United States is aware. See Br. of Int'l Law Prof. 22; Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 Yale J. of Int'l Law 65, 101 (1995) ("no other nation invites such cases into its courts"). Perhaps the closest analogue is a 1993 Belgian law that authorized Belgian courts to hear war crimes cases regardless of where the crimes allegedly occurred or whose nationalities were involved. However, that act was met by a strong international condemnation (including by the United States), and was substantially narrowed. See Br. for Commonwealth of Australia et al. 8-9 & nn.9-10. The broad conception of universal *civil* jurisdiction that respondent advances is even more revolutionary than such controversial efforts to assert universal criminal jurisdiction. *Id.* at 6-7.

The unprecedented nature of the legal regime that the Ninth Circuit has adopted, and that respondent and his amici urge this Court to embrace in this case, is all the more reason for the Court to insist on a clear textual statement from Congress that it intended to create such a regime. Section 1350 does not come close to supplying any such command.

III. SECTION 1350 DOES NOT APPLY ABROAD

Even if Section 1350 could be read to create a cause of action, or otherwise to permit implication of a cause of action from customary international law, Section 1350 should not be construed to permit such a result the world over. As the United States has explained, such a construction would be incompatible with the presumption against extraterritoriality and the general aversion that the founding generations had to casting judgment on the domestic actions of other countries. U.S. Br. 46-50. If anything, that presumption only gathers force when, as here, construing a statute to have extraterritorial effect would be likely to intrude on matters pertaining to the conduct of foreign affairs by the political branches. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-441 (1989).

Respondent suggests (Br. 27 n.26) that "the explicit references in [Section 1350] to 'aliens' and to the 'law of nations' confirm that Congress intended that the [statute] would apply to conduct outside the United States." That is incorrect. Indeed, the only two reported decisions in which Section 1350's predecessor was mentioned in the decade following its original enactment in 1789 took place on American soil or in United States territorial waters. See U.S. Br. 17, 48 (discussing *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895), and *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607)). In addition, the incidents involving assaults on ambassadors that respondent himself recounts (Resp. Br. 18-20) in describing the backdrop of the First Judiciary Act occurred on *domestic soil* and involved the commission of an

offense against the law of nations that Congress explicitly defined and made punishable pursuant to the First Crimes Act in 1790. See 1 Stat. 113-115, 117-118; U.S. Br. 33.[9]

At the same time, if Section 1350 is construed to create a cause of action with respect to violations of international law against aliens anywhere in the world, then Section 1350 would have the effect of transporting United States law (including the United States courts' own interpretation and application of international law norms) to the far reaches of the globe in a manner that there is no indication that Congress intended. Indeed, as explained, the founding generations were particularly sensitive to the prospect of United States courts sitting in judgment on the actions of other nations, especially in foreign lands. See U.S. Br. 47; see also Br. for Commonwealth of Australia et al. 8-10 (discussing friction created by extraterritorial application of United States law). Such sensitivity is no less warranted today, and provides all the more reason to give effect to Section 1350's terms and hold that it is solely a jurisdictional grant.

* * * * *

For the foregoing reasons, as well as those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MARCH 2004

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[9] Contrary to respondent's suggestion (Br. 5, 22-24), the "transitory tort doctrine" does not override the typical presumption against extraterritorial application of a federal statute. Cf. *Amerada Hess*, 488 U.S. at 440-441 (applying presumption against extraterritoriality in case involving alleged tort on high seas). Moreover, a practice's uniform condemnation by all nations provides, if anything, less justification for projecting United States law and courts into foreign countries.

(32)

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IN THE

Supreme Court of the United States

JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

As petitioner and the United States have shown, the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), is simply a grant of jurisdiction. Although some of respondent's *amici* argue that the ATS provides a cause of action, most of his *amici*—and ultimately respondent himself—recognize that it does not. They argue instead that the ATS provides a federal forum for a species of supposedly "well-recognized" common law tort actions for violations of the law of nations.

The laudable desire to provide redress for injuries suffered at the hands of brutal dictators does not justify distorting the plain language of the ATS or its historical underpinnings. In enacting the First Judiciary Act, Congress sought to vest jurisdiction, not to create causes of action. There was manifestly no such thing in 1789 as a "tort" for a violation of the law of nations. And the law of nations itself was not then, and is not now, the source of any causes of action, but rather a source of rules for deciding otherwise authorized suits.

ARGUMENT

I. The Alien Tort Statute Does Not Provide A Cause Of Action.

Contrary to respondent's claim, construing the ATS, in accordance with its plain terms, as a mere grant of jurisdiction does not improperly focus on a single word in the statute. Resp. Br. at 9. To be sure, the word "jurisdiction" is pivotal in the ATS because it denotes its inherent function. But the phrase "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. § 1350, serves the obvious purpose of limiting the scope of the jurisdictional grant. It is no more meaningless than language that limits another jurisdictional grant to suits "commenced by the United States." *Id.* § 1345.

Nor is it true that interpreting the ATS as a simple grant of jurisdiction renders the statute "nugatory from its inception." Resp. Br. at 22. As this Court has recognized, a jurisdictional grant is not meaningless simply because Congress must subsequently create actions that fall within its scope. *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 415 (1865) (because the First Judiciary Act was passed before there were any federal criminal statutes, the clause in that Act "giving the Circuit Courts concurrent jurisdiction in all cases of crime cognizable in the District Courts, must, of necessity, have had reference to such statutes as should *thereafter* define offences to be punished") (emphasis added). Indeed, the treaty-prong of the ATS necessarily anticipates the creation of subsequent rights that will fall within the scope of the ATS's jurisdictional grant. And respondent and his *amici* concede that other clauses of Section 9 of the First Judiciary Act "contemplated that Congress might enact legislation under which a criminal prosecution or civil suit might be brought." Resp. Br. at 12 n.15 (emphasis deleted); Br. of Fed. Jur. Prof. at 16 (same). These "prospective" jurisdictional grants, like the ATS, were not "nugatory" upon their enactment.

According the ATS its purely jurisdictional meaning, moreover, does not effectively "rewrite[]" it as though it grants jurisdiction over actions "'arising under statutes defining'" torts elsewhere. Resp. Br. at 13 (emphasis deleted). Like the clauses surrounding it, the ATS illustrates that the "arising under" formulation is not the only way to confer federal jurisdiction over subsequently enacted actions. Nor does the word "violation" distinguish the ATS from other clauses in Section 9 or show that it creates a cause of action. *Id.* at 13, 33. The first and third clauses of Section 9 refer to "crimes . . . committed" and "penalties and forfeitures incurred," yet these clauses did not create underlying actions. See also *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 576-77 (1979) (statute granting "jurisdiction of *violations* of"

federal securities law did not create private right of action) (emphasis added).

The ATS' plain jurisdictional meaning is confirmed by the history of the First Judiciary Act. In creating a new federal judicial system, Congress wrestled with fundamental and hotly contested questions concerning the very existence and role of federal courts, not the creation of specific "causes." See Ptr. Br. at 16-20. Respondent suggests that the ATS was "broadly accepted by Federalists and Anti-Federalists alike," Resp. Br. at 20 n.21, but the anti-federalists tried to block the creation of *any* district courts, and then to limit their jurisdiction to maritime cases, Ptr. Br. at 17-19—efforts that would have eliminated the ATS. The clear import of these battles is that the ATS, like the First Judiciary Act itself, narrowly conferred jurisdiction, and left it to other enactments to create the "causes" to which that jurisdiction extended.

Indeed, the debates over the First Judiciary Act reveal that members of the first Congress appreciated the difference between jurisdiction and "causes of action," and recognized that they were addressing only the former. *Id.* at 18-24.[1] Nor do respondent and his *amici* dispute that the first Congress created numerous causes of action elsewhere, and used markedly different language than that found in the ATS to do so. *Id.* at 14 & n.4, 23. In fact, respondent ultimately concedes that the ATS does not create any cause of action. Abandoning the rationale of the lower courts—whose unanimous recognition of a cause of action he repeatedly touts, Resp. Br. at 4, 8—respondent claims there was "no reason for the First Congress to create a federal statutory right of action for torts in violation of the law of nations." *Id.* at 10 n.11 (internal quotation marks and citation omitted); see also Br. of Fed. Jur. Prof. at 11 (ATS "did not create a statutory

[1] Any claim that the first Congress was unfamiliar with the *concept* of a cause of action, Br. of Nat'l and For. Prof. at 7, is thus flatly wrong. *See also* 3 William Blackstone, *Commentaries* *273 (referring to a "cause of action" in his discussion of private wrongs).

cause of action"). Instead, he argues that such "torts" were already actionable at common law, and under the law of nations itself. Resp. Br. at 11, 13. These claims are incorrect.

II. There Were No Common Law "Torts" For Violations Of The Law Of Nations In 1789.

The historical evidence demonstrates conclusively that there were no recognized common law actions to seek redress for torts "in violation of the law of nations" as of 1789. It is undisputed that tort law was in its infancy at the time, Ptr. Br. at 24, and that Blackstone listed only "trespasses, nuisances, assaults, defamatory words, and the like," as recognized tort actions. 3 Blackstone, *supra*, at *117. Nowhere in his enormously influential treatise did Blackstone refer to piracy, violations of safe-conducts, or infringements of the privileges of ambassadors as "torts." See also William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Laws of Nations*, 18 Conn. L. Rev. 467, 491 (1986) (Blackstone did not treat violations of the law of nations as "a civil tort").

Instead, Blackstone treated these transgressions as crimes. He discussed them in an entirely separate volume devoted to "Public Wrongs," and referred to the State's obligation "to animadvert upon them with a becoming severity," 4 Blackstone, *supra*, at *68—an archaic reference to the imposition of *punishment*. See *Webster's Third New International Dictionary* 85 (1993) (defining "animadversion"). Following his lead, the Continental Congress called, in its 1781 Resolution, for the "expeditious, exemplary and adequate *punishment*" of a largely identical set of violations, noting that the "*punishment* should be co-extensive with *such crimes*." 21 Journals of the Continental Congress 1774-1789, at 1136-37 (G. Hunt ed., 1912 (1781) ("Journals") (emphases added). In the two celebrated incidents in which the rights of diplomats were infringed, the law of nations was vindicated through criminal, not civil, actions. Ptr. Br. at 26. And Congress "animadverted upon" these transgressions by

including them in the first federal criminal statute. See An Act for the Punishment of certain Crimes against the United States, ch. 9, §§ 8-9, 25-28, 1 Stat. 112, 113-14, 117-18 (1790) ("First Crimes Act").

Respondent and his *amici* try to gloss over these facts by noting that "criminal and civil liability could arise out of the same act," and by asserting that the assaulted French General Consul, Marbois, "could also have brought a common law tort action against his assailant in state court." Resp. Br. at 11, 19; Br. of Fed. Jur. Prof. at 14. But the conclusion they seek to draw—that violations of the law of nations were actionable torts—does not follow. Marbois had the same right to bring a tort action for *assault* that any non-diplomat victim of an assault had. The availability of this remedy does not show that infringements of the rights of ambassadors *vel non*—including, for example, the service of otherwise valid legal process on their servants or property, 4 Blackstone, *supra*, at *70—were independently actionable torts. In fact, there could have been no tort action for piracy, because "the common law did not allow civil recovery for an act that constituted both a tort and a felony," *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 382 (1970), and piracy was a felony. 4 Blackstone, *supra*, at *71.

Respondent scoffs at the idea that the first Congress "used the word 'tort' in some innovative" way, Resp. Br. at 12, but neither he nor his *amici* can explain why, if violations of the law of nations were well-established torts, the Continental Congress asked States "to authorise suits to be instituted for damages by the party injured" by such violations. 21 Journals at 1137. Their claim that Congress passed a resolution calling on States to enact statutes "to authorise" damages actions simply to "restate the law of nations," Br. of Fed. Jur. Prof. at 15 n.10, is absurd, and inconsistent with articles written by these same *amici*.[2] It is also belied by evidence that

[2] One scholar explained that "Congress became concerned with *how* to redress individual violations of the law of nations." William S. Dodge,

contemporaries "lament[ed] the states' failure to act upon the resolution," and that Thomas Jefferson "urg[ed] Madison to introduce a bill" in Virginia in 1784 that would have authorized such actions. Casto, *supra*, at 491 n.134.

Amici admit, moreover, that the indemnity actions for the United States that the resolution requested went "beyond the existing common law." Br. of Fed. Jur. Prof. at 16 n.10. Thus, they implausibly claim that Congress used the phrase "to authorise suits" as a way of asking States simultaneously to create entirely new private damages actions and to restate the common law. In fact, the request for an indemnification remedy confirms that injured parties did *not* have tort remedies for damages against offenders—reparations were paid by nations, not by tortfeasors.[3] The 1781 Resolution is simply fatal to any claim that violations of the law of nations were actionable torts.

That other legislative acts were necessary to create the "tort" actions to which the ATS extended jurisdiction is also confirmed by the treaty-prong of the statute. Blackstone identified no "tortious" violations of treaties, and respondent and his *amici* do not even suggest that such torts existed.

The Historical Origins of the Alien Tort Statute: A Response to the "Originalists," 19 Hastings Int'l & Comp. L. Rev. 221, 226 (1996) (emphasis added). This concern demonstrates that redress was not available, not that its availability needed to be restated.

[3] That there were no recognized "law of nations" torts is also confirmed by reactions to the ATS itself. Edmund Pendleton, who helped revise Virginia's statutes and served as Chief Justice of its Supreme Court, asked James Madison "what is meant by a *Tort*? Is it intended to include suits for the Recovery of debts, or on breach of Contracts, *as a reference to the laws of Nations & Fœderal treaties seems to indicate;* or does it only embrace Personal wrongs, according to its usual legal meaning, or violations of Personal or Official privilege of foreigners?" Letter of E. Pendleton to J. Madison (July 3, 1789), *reprinted in* 4 *The Documentary History of the Supreme Court of the United States 1789-1800*, at 444, 446 (M. Marcus, ed., 1992) (second emphasis added). Pendleton associated the law of nations with commercial disputes, not torts, and was plainly mystified by the very idea of a "tort in violation of the law of nations."

Accordingly, this prong of the ATS must be understood to confer jurisdiction over actions created in treaties themselves, not the common law. And several treaties did create damages remedies for injuries inflicted by privateers. See Ptr. Br. at 15 (citing treaties).

III. The Law Of Nations Did Not Create Causes Of Action.

Nor is it true that the law of nations "defined actionable rights even without legislative implementation." Resp. Br. at 13. In making this misleading claim, respondent and his *amici* attempt to blur the distinction between a cause of action—*i.e.*, the authorization to "invoke the power of the court" to enforce a right, *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979)—and the rules of decision used to resolve otherwise authorized actions. Their evidence shows only that the law of nations was the source of the latter. Indeed, international law still does not create private causes of action.

Petitioner does not dispute that eighteenth century lawyers considered the law of nations part of the common law. But U.S. courts resorted to the law of nations "to provide *the rules of decisions* in particular cases." William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1517 (1984) (emphasis added).[4] Thus, while this Court has recognized that international law "must be ascertained and administered by the courts . . . as often as questions of right depending upon it *are duly presented* for their determination," *The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasis added), respondent and his *amici* cite no

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[4] *See also* St. George Tucker, *Appendix to* 1 William Blackstone, *Commentaries*, at note E (S. Tucker ed. and comm. 1803) (the law of nations is "resorted to as the rule of decision" where appropriate).

evidence that the law of nations provided the authorization to "duly present[]" "questions of right" in the first place.[5]

In fact, "the law of nations *never* has been perceived to create . . . the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws." *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) (emphasis added). "International law itself . . . does not require any particular reaction to violations of law." Louis Henkin, *Foreign Affairs and the Constitution* 224 (1972). This principle is reflected in various international documents and treaties that exhort nations to authorize such actions (rather than purport to create the actions for them),[6] and in foreign laws that create civil remedies for violations of international legal norms pursuant to the sovereign powers of the enacting States.[7]

Finally, the short-lived theory of federal "common law" *crimes*, Resp. Br. at 21; Br. of Fed. Jur. Prof. at 7, 12, 17, does not establish that the law of nations gave rise to *civil* causes of action. As one of respondent's *amici* has elsewhere explained, this theory was the product of a bitter partisan conflict, was vehemently criticized at the time, and was

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[5] *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796), and *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), do not show that the law of nations created "enforceable rights." Resp. Br. at 17. International law provided only the rules of decision in these cases; the *causes of action* (for recovery of a debt in *Ware* and libel in *The Nereide*) were provided by domestic law. Indeed, respondent and his *amici* nowhere dispute petitioner's showing that, by the eighteenth century, maritime law was domestic law in both the United States and England. *See* Ptr. Br. at 29 n.9. Thus domestic law, not the law of nations, is the source of maritime causes of action (including the causes of action in *The Nereide* and *The Paquete Habana*).

[6] *See* Br. for the Ctr. for Justice & Accountability at 3 n.2 (citing non-binding Universal Declaration of Human Rights and non-self-executing International Covenant on Civil and Political Rights ("ICCPR")). *See also* Ptr. Br. at 41 (discussing these same documents).

[7] *See* Br. of Int'l Jurists at 24-25 (citing statutes).

renounced by a number of its early proponents, including Jefferson and Attorney General Edmund Randolph. See generally Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. Pa. L. Rev. 1003 (1985). More importantly, this Court flatly rejected the theory, explaining that Congress must "make an act a crime, afix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).[8] So too here, Congress had to create "torts" in violation of the laws of nations, not just confer jurisdiction over such actions.

IV. The Political Departments Did Not Consider Violations Of The Law Of Nations To Be Torts.

Faced with overwhelming evidence that violations of the law of nations were not independently actionable torts as of 1789, respondent tries to show that the courts, Congress and the executive branch thought otherwise. Respondent and his *amici*, however, misapprehend the import of all of this evidence, none of which establishes that violations of the law of nations were cognizable common law torts.

The decision in *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895), for example, flatly refutes respondent's claims. In dismissing a libel action brought by English owners of a ship seized by French privateers in neutral U.S. waters, the court explained that the libellants' suit for restitution was not one for a "tort only," and thus fell outside the jurisdictional grant of the ATS. *Id.* at 947-48. In addressing their admiralty claims, however, the court made

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[8] Respondent's reliance on *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (1784), is thus utterly misplaced. Whatever ability Pennsylvania courts had to create common-law crimes, "[f]ederal courts, unlike state courts, are not general common-law courts." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 312 (1981). *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153 (1820), is equally irrelevant: the federal statute at issue there formally incorporated a definition of "piracy" from the law of nations.

clear that the libellants had *no cause of action* at all for a violation of the law of nations.

The purported claim for "marine trespass" necessarily depended on the legality of the capture ("it is impossible to enquire into the question of trespass, without involving that of prize," *id.* at 947), and the libellants argued that the capture was illegal because "the law of nations forbid fitting out privateers in a neutral country, or capturing within its limits, friends of the neutral." *Id.* at 943 (recounting counsel's arguments). The court agreed that the conduct violated the law of nations, but concluded that a private party injured by such a violation had no judicial remedy. Such a party could "call[] on the neutral sovereign to assert these rights" through diplomatic means and, if necessary, by force, but "[i]t does not seem proper that a suit, founded on the ground of invasion of neutral territory, should be maintained by a belligerent party." *Id.* at 946.[9]

Moxon also demonstrates the error in the dicta in *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). Because Bolchos sought "restitution," *id.*, his suit was not for a "tort" and the ATS thus did not provide jurisdiction over it. Instead, he brought a traditional prize action and relied on a treaty that stated that neutral property found on enemy vessels "may be confiscated." Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr. art. XIV, 1 Malloy 468, 473. There was no claim that, by seizing and selling the property that Bolchos had confiscated, Darrel *violated* a treaty that merely *permitted* confiscations, and the court noted that Darrel's action was consistent with the law of nations. *See* 3 F. Cas. at 811. Thus, because *Bolchos* did not involve any violation of the law of nations or a treaty, it does not establish that such

[9] The court repeated this point, stating that, while the libellants had alleged a violation of the law of nations, "still the question recurs—which is the proper department of the neutral state to inquire into and vindicate this offence?" *Moxon*, 17 F. Cas. at 947. The court concluded it was the business of the executive, not the judicial, department. *Id.* at 947-48.

violations were actionable torts. Instead, as respondent himself concedes, the law of nations and the treaty simply "provided a rule of decision." Resp. Br. at 16.

The fact that the ATS gave state courts concurrent jurisdiction, Br. of Fed. Jur. Prof. at 15, does not demonstrate that torts in violations of the law of nations were cognizable at common law. State courts were given concurrent jurisdiction over actions under 42 U.S.C. § 1983 and the Federal Employer Liability Act, yet these federally created claims plainly were not cognizable at common law. The argument that the concurrent jurisdiction of the circuit courts has no meaning unless such torts were actionable at common law, Br. of Fed. Jur. Prof. at 14, fails for the same reason. The interpretive rule that courts must, where possible, give meaning to all clauses of a statute simply cannot change the historical fact that there were no cognizable common law torts in the 1780s for violations of the law of nations.[10]

Finally, respondent and his *amici* place great weight on a 1795 opinion by Attorney General Bradford. Writing during the neutrality crisis, Bradford described the participation of U.S. citizens in a raid on a British colony as a "violation of a treaty"—not the law of nations. 1 Op. Att'y Gen. 57, 58 (1795). Believing this conduct to be beyond the reach of U.S. criminal laws, Bradford stated that the British victims had "a remedy by a civil suit" in light of the ATS's jurisdictional grant. *Id.* at 59. Bradford appears to have been referring to a recently negotiated and soon-to-be-ratified treaty with Great

[10] In fact, Congress often created federal causes of action in the 1790s by authorizing the recovery of damages "in any court . . . having jurisdiction of the recovery of debts." *See, e.g.*, ch. 29, § 5, 1 Stat. 131, 133 (1790). Because the circuit courts' authority to hear "all suits of a civil nature at common law," First Judiciary Act, ch. 20, § 11, 1 Stat. 73, 78 (1789), extended to debt actions, they presumably could hear cases created by such statutes. Accordingly, Congress could have used similar language to create a cause of action for torts in violation of the law of nations without nullifying the grant of concurrent jurisdiction to the circuit courts.

Britain, which provided that the citizens of one nation "shall forbear doing any damage to those of the other party," and "shall also be bound in their persons and estates to make satisfaction and reparation for all damages, and the interest thereof, of whatever the nature said damages may be." Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., art. XIX, 1 Malloy 590, 602. Like a comparable article in the treaty with France, see Ptr. Br. at 15, this provision gave aliens a private damages action for violation of a treaty obligation. Bradford's opinion, therefore, is not evidence that violations of the law of nations were independently actionable torts, but rather that the ATS provided jurisdiction for causes of action found elsewhere.

This reading is reinforced by a comparison of Bradford's opinion with one Attorney General Randolph had issued three years earlier. Addressing the arrest of a domestic in the residence of Mr. Van Berkel, the Dutch ambassador who had previously protested the Marbois incident and a prior invasion of his own residence, see Casto, *supra*, at 491-92 n.138, 494, Randolph concluded that the ambassador could "appeal, upon the arrest, to the [First Crimes Act] alone," and that the officer's entrance into the residence might be punishable under that act or as a common law crime. 1 Op. Att'y Gen. 26, 28 (1792). No provision of the U.S. treaty with the Netherlands provided a damages remedy for such conduct, however, and Randolph (unlike Bradford) did not suggest that any civil remedy was available.[11]

In short, none of the evidence respondent cites establishes that violations of the law of nations were independently actionable torts in the 1780s, and the contrary evidence from Blackstone, the 1781 Resolution, *Moxon*, and numerous

[11] The 1907 Attorney General opinion, *see* Resp. Br. at 15 n.17, is not contemporaneous, and its assertion that the ATS and diversity statute "provide a right of action," 26 Op. Att'y Gen. 250, 252 (1907), "should be dismissed as a sloppy reference to the federal courts' jurisdiction and not to the existence of a statutory cause of action." Casto, *supra*, at 479 n.58.

contemporary statements and actions demonstrates that there were no recognized common law tort actions for redress of such violations. Nor is it hard to understand why, after enacting the ATS, Congress failed to create a corresponding cause of action. Ellsworth and the other framers who had worried about U.S. infractions of the law of nations had done all that the law of nations required, by enacting a federal criminal statute that "animadvert[ed] upon [such offenses] with a becoming severity," 4 Blackstone, *supra*, at *68. The law of nations did not require civil redress for such offenses, and Congress's apparent intention to provide such a remedy (in accordance with the recommendations of the 1781 Resolution) was presumably overtaken by the tumultuous events and more pressing needs of the 1790s.

V. The Alien Tort Statute Does Not Confer Power To Create A Federal Common Law Cause Of Action.

Finally, for many of these same reasons, the ATS does not authorize courts to create a federal common law cause of action for violations of the law of nations. Some of respondent's *amici* claim that the ATS empowers courts to determine when international rights should be actionable in U.S. courts, "just as though the federal courts were courts of general jurisdiction." Br. of Alien Friends at 5.[12] But federal courts are not "general common-law courts," *City of Milwaukee* v. *Illinois*, 451 U.S. at 312, and statutes that merely vest jurisdiction (as the ATS does) confer no "authority to formulate federal common law." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). While *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), indicates that courts can fashion federal common law rules in cases implicating foreign relations, it authorized the creation of rules of avoidance and deferral to the political

[12] Respondent does not address whether courts can use federal common law to create a cause of action; he argues only that courts may fill gaps in the tort actions that the ATS supposedly federalized. Resp. Br. at 29-32.

branches, not the creation of causes of action. See Ptr. Br. at 31.

Respondent's *amici* rely on the fact that, in the eighteenth century, federal courts viewed the law of nations as part of the common law. Br. of Alien Friends at 6-13. But courts derived rules of decision from this law, not causes of action. See *supra*. Indeed, just three years after the ATS was passed, the court in *Moxon* rejected the claim that a private tort action could be based on a violation of the law of nations.

In fact, even general jurisdiction state courts did not recognize causes of action for violations of the law of nations, which is why Congress urged States to create such actions by statute, Connecticut did so, and Thomas Jefferson urged Virginia to follow suit. Proponents of the First Judiciary Act would not have conferred a common law-making power on federal courts that state courts had never exercised. Rather, they sought to placate anti-federalist fears of federal court aggrandizement, and refused to give federal courts greater equity powers than state courts enjoyed. Ptr. Br. at 16-19.

VI. Separation-Of-Power Concerns Bar Implication Or Creation Of A Cause Of Action.

As petitioner has shown, a judicially implied or created cause of action under the ATS can interfere with the management of foreign affairs, undermine national security efforts, and usurp the constitutional role of the political branches to decide when international norms should be actionable. Ptr. Br. 34-43. Claims that these separation-of-powers problems are judicially manageable are both wrong and irrelevant: courts should not recognize causes of action that raise such concerns absent clear evidence Congress intended them to do so, and there is no such evidence here.

1. As *amici* diplomats acknowledge, ATS cases can "damage U.S. foreign policy interests, including the promotion and protection of human rights." Diplomats Br. at 17. The majority below conceded that ATS litigation

"inevitably raises issues implicating foreign relations," Pet. App. 18a, and, in recent cases, foreign governments expressed concern and even outrage at the mere existence of suits. See Ptr. Br. at 35. And the risk of ATS liability can chill U.S. investment where the promise of such investment, or the threat of withholding it, can be used to promote U.S. values abroad. The judicial doctrines respondent and his *amici* cite provide inadequate protection against such harms.

The political question doctrine did not stop the majority below from addressing a transborder arrest and detention authorized by senior government officials, an issue fraught with "policy and diplomatic" concerns, Pet. App. 3a. Indeed, courts have often refused to dismiss ATS cases on the basis of this doctrine.[13] The act of state doctrine does not bar suits challenging the conduct of U.S. officials at all, see *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897) (doctrine applies to acts of foreign governments), and "rare[ly] . . . preclude[s] suit under the [ATS]." *Kadic*, 70 F.3d at 250. And *forum non conveniens* principles do not bar judicial review, but shift it to the courts of other countries, see, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 n.22 (plurality opinion) (1981), which only exacerbates separation-of-powers concerns in a case involving U.S. conduct.

Soliciting the views of the State Department about the foreign policy implications of particular cases, Diplomats Br. at 18, presents its own set of problems. "Often the State Department will wish to refrain from taking an official position, particularly at a moment that . . . might be inopportune diplomatically." *Sabbatino*, 376 U.S. at 436. Moreover, deference to such executive branch views forces courts to adopt views on international legal questions that should be adopted by the executive branch, and can tie the availability of relief to the views of particular administrations. See *First Nat. City Bank* v. *Banco Nacional de Cuba*, 406

[13] *See, e.g.*, *Abebe-Jira* v. *Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995).

U.S. 759, 790-91 (1972) (Brennan, J., dissenting). Indeed, respondent himself objects to judicial deference to executive branch judgments for this latter reason. Resp. Br. at 42-43.

2. Similarly, the process of deciding which international legal norms are actionable in U.S. courts necessarily trenches on the constitutional responsibilities and powers of the political branches. Ptr. Br. at 40-43. Respondent blithely asserts that the ATS cannot be used to "enforce unratified or non-self-executing treaties." Resp. Br. at 26. But that is precisely what happened in this case, where the lower courts derived an actionable norm from such treaties, along with non-binding U.N. declarations. See Ptr. Br. at 41. In fact, respondent quickly backtracks from his disavowal, suggesting that it *is* proper to derive actionable norms from non-self-executing treaties in order to give content to the "law of nations" phrase in the ATS. Resp. Br. at 26 n.24.

Nothing in *The Paquete Habana* or its progeny justifies this judicial usurpation of constitutional authority. In arguing otherwise, respondent and his *amici* once again fail to recognize the fundamental difference between deriving causes of action from international law and deriving rules of decision. Where a court uses international law to resolve an otherwise authorized claim, there is no necessary conflict with political branch perogatives; courts have some limited authority to prescribe federal rules of decision where Congress is silent. But, as the very concept of non-self-executing treaties makes clear, rights created by treaty are not actionable unless the political branches choose to make them so. When courts derive actionable norms from non-self-executing treaties, therefore, they inescapably usurp judgments that the Constitution reserves exclusively to the political branches. And, in doing so, they also interfere with the ability of the political branches to influence and shape the international consensus on which norms should be binding.

3. In addition to being mistaken, respondent's claims that courts can manage the separation-of-powers problems of ATS

litigation misses the larger point. It is generally true that, in resolving *duly authorized* actions, courts cannot shrink from their duty to interpret statutes merely because their decisions may affect foreign relations. *Japan Whaling Ass'n* v. *American Cetacean Soc.*, 478 U.S. 221, 230 (1986). But the issue here is whether the ATS should be interpreted to authorize an action in the first place. Because actions for violations of international legal norms raise grave separation-of-powers concerns, courts should not imply or create them absent clear evidence that Congress intended them to do so. Cf. *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) (refusing, on separation-of-powers grounds, to imply a remedy for violations of military members' constitutional rights).

There is no such evidence here. To the contrary, as petitioner has shown, and respondent and his *amici* nowhere dispute, the founding generation repeatedly sought to avoid offending other nations. Whether or not they expected the law of nations to evolve, members of the first Congress plainly did not intend courts to recognize causes of action that would permit U.S. courts to pass moral, factual and legal judgment on the conduct of foreigners in their own countries; that would provoke expressions of concern and outrage by foreign governments; and that would complicate political branch management of foreign affairs. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 844, 848 (1989) ("*Law of Nations*") (early pronouncements about the application of the law of nations were intended to augment executive power over foreign affairs).[14]

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[14] The "transitory tort" doctrine, Resp. Br. at 22-24, does not prove otherwise. Respondent offers no evidence that other countries recognized torts for violations of the law of nations in the 1780s. Thus, U.S. recognition of such claims for conduct that occurred between aliens on foreign soil would have given U.S. law extra-territorial application, by providing remedies where foreign nations would not have. It would also have exceeded Article III's grant of alienage jurisdiction.

VII. Congress Has Not Ratified Implication Or Creation Of A Cause Of Action.

Respondent and his *amici* quote extensively from floor statements and committee reports accompanying passage of the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992), in an effort to show that Congress ratified judicial recognition of a cause of action under the ATS. As petitioner and the government have shown, however, these statements concerning the meaning of a statute passed centuries earlier are irrelevant. See *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988); *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 783 n.12 (2000). In fact, passage of the TVPA undermines respondent's claims, since there would have been no need to create an express cause of action for aliens for torture and extra-judicial killings if, as respondent claim, the ATS provided aliens with a remedy for violations of all binding international legal norms.

Several *amici* argue that the TVPA, as well as several other enactments, should be understood as leaving the judicially implied cause of action under the ATS intact. Br. of Nat'l. & For. Prof. at 15-16; Br. of Alien Friends at 15. The TVPA, however, was not a "comprehensive reexamination and significant amendment of" the ATS that "left intact the statutory provision[] under which" a cause of action had been implied. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 382 (1982). The TVPA is not part of the ATS at all, and the decision to codify it as a note to the ATS was not made by Congress. See Br. of Nat'l Ass'n Mfrs. at 18 n.28.

Nor does the TVPA compel the conclusion that the ATS creates a cause of action. In both *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *United States* v. *Estate of Romani*, 523 U.S. 517 (1998), later, more detailed enactments foreclosed broad interpretations of earlier statutes. Here, the clear implication of the TVPA's detailed

express cause of action is that the ATS does not provide such a right.

In fact, the TVPA represents the constitutionally proper means for the federal government to demonstrate this Nation's commitment to fundamental human rights. Such legislation, in which the political branches determine which norms are actionable, provides courts with concrete, judicially manageable liability standards, and ensures that they confront politically sensitive cases with the blessing of the departments responsible for managing foreign affairs. Other nations have likewise demonstrated their own commitment to such rights through legislatively conferred causes of action.[15]

VIII. Petitioner Did Not Violate Any Actionable Norm Of Customary International Law.

1. If this Court concludes that it is proper to imply or create a cause of action under the ATS, it should limit such actions to enforcement of those norms to which the political branches have assented. Respondent objects that any limitation on ATS actions would "redraft the statute." Resp. Br. at 45. From the very outset, however, "the United States endeavored to influence the development of the law of nations by asserting diplomatic positions that at times were in opposition to established international law." Jay, *Law of Nations* at 846. In light of that history, there is absolutely no reason to believe that the drafters of the ATS contemplated that they were creating tort liability for the violation of norms to which the United States itself has not assented.

Indeed, the propriety of such a limitation is illustrated by respondent's defense of the decision below. He cites a non-binding conclusion of a U.N. working group, which found

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[15] *See, e.g.*, art. 1, § 1, VStGB (Germany) (Code of Crimes Against International Law), (specifying crimes); § 403, StPO (Germany) (Criminal Procedure Code) (providing civil action for same); C. Pr. Pén., arts. 689-2, 689-3, 689-8, 689-9 (France) (Criminal Procedure Code) (specifying crimes); *id.* arts. 2-3 (providing civil action for same).

that his detention violated the Universal Declaration of Human Rights, the ICCPR, and a U.N. General Assembly resolution. Resp. Br. at 49. But, the United States approved the Universal Declaration on the understanding that it was not binding; it ratified the ICCPR subject to the reservation that this treaty did not give rise to any actionable rights; and U.N. resolutions are, by definition, non-binding. Ptr. Br. at 41. Nothing in the language of the ATS justifies, let alone compels, the conclusion that the statute imposes tort liability for violation of international norms that the political branches have agreed to on the understanding they are not legally binding.

2. In all events, respondent's brief detention did not violate customary international law, which requires a detention to be "prolonged." Restatement (Third) of Foreign Relations Law § 702(e) (1987). Respondent dismisses the Restatement as an "anomalous departure," Resp. Br. at 48 n.48, but the ICCPR and Universal Declaration do not define "*arbitrary* detention" as any detention, no matter how brief, and a single district court's rejection of the Restatement, *id.* (emphasis added), is not evidence of state practice. Finally, respondent's detention was not "arbitrary," because it was legally authorized, as the United States has shown.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,
Petitioner,
v.
HUMBERTO ALVAREZ-MACHAIN, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL FOREIGN TRADE COUNCIL, USA*ENGAGE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS, THE INTERNATIONAL CHAMBER OF COMMERCE, THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, THE BUSINESS ROUNDTABLE, THE AMERICAN PETROLEUM INSTITUTE, AND THE US-ASEAN BUSINESS COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Amici curiae The National Foreign Trade Council, USA* Engage, The Chamber of Commerce of the United States of America, The United States Council for International Business, The International Chamber of Commerce, The Organization for International Investment, The Business Roundtable, the American Petroleum Institute, and the US-ASEAN Business Council respectfully submit this brief in support of Petitioner, with the written consent of the parties.[1]

INTEREST OF AMICI CURIAE

Amici curiae and their members have a vital interest in the issues raised by petitioner. Over the past decade, scores of U.S. and international companies have been sued under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), in cases stemming from their investments and operations outside of the United States. While some companies are alleged to have committed violations of the law of nations directly, more often plaintiffs have treated companies as surrogates for foreign governments—alleging that companies' overseas investments aided and abetted or otherwise facilitated human rights abuses by those governments. Not only do these lawsuits strain relations between the United States and the foreign governments who are the indirect targets of the litigation, they discourage foreign investment. Because of the importance of these issues to *amici*'s member companies, they seek leave to file this brief *amici curiae*, in order to assist the Court in its consideration of the issues in this case.

The National Foreign Trade Council (the "NFTC") is the premier business organization advocating a rules-based world economy. The NFTC and its affiliates serve more than 300 member companies.

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[1] Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their counsel, or their members made a monetary contribution to this brief.

USA*Engage is a broad-based coalition representing organizations, companies, and individuals from all regions, sectors, and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state, and local levels.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every region of the country. Chamber members transact business in all of the United States, as well as in large numbers of countries around the world.

The United States Council for International Business ("USCIB") is a business advocacy and policy development group representing 300 global companies, accounting firms, law firms, and business associations. It is the American affiliate of the International Chamber of Commerce and the International Organization of Employers.

The International Chamber of Commerce ("ICC") is the world business organization representing companies, chambers of commerce and business associations in 130 countries. Its mission is to promote multilateral trade among nations in the interest of global prosperity and peace.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States.

The Business Roundtable (the "Roundtable") is an association of CEOs of leading U.S. corporations with a combined workforce of more than 10 million U.S. employees. The Roundtable is committed to advocating public policies that ensure vigorous economic growth, a

dynamic global economy, and the well-trained and productive U.S. workforce essential for future competitiveness.

The American Petroleum Institute ("API") represents over 450 members involved in all aspects of the petroleum industry, including exploration, production, refining, and marketing. API members operate throughout the world as part of their commitment to meet America's energy needs.

The US-ASEAN Business Council is America's leading private business organization dedicated to promoting increased trade and investment between the United States and the member nations of the Association of Southeast Asian Nations.

In the aggregate, the organizations filing this brief represent a substantial proportion of all entities doing business in the United States and internationally, and, indirectly, much of the U.S. workforce. These same entities are also major players in the global economy, investing in and doing business with partners around the world. The *amici* are charged with representing the legal and policy interests of their members in matters of national import, and are regularly involved in litigation relating to international commerce and foreign policy issues. Such cases have included, for example, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), in which the NFTC brought suit with *amicus* support from the Chamber, OFII, and USCIB; *American Insurance Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003), in which several of the groups filed *amicus* briefs; and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001), in which USCIB filed an *amicus* brief.

SUMMARY OF ARGUMENT

Petitioner Sosa and the United States make clear how the holdings below interfere with the United States'

counterterrorism and anti-crime efforts. This brief will focus instead on an issue of special importance to *amici*: how the erroneous interpretation and expansion of the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), wreaks economic damage and undermines the nation's foreign policies.

The ATS, a single sentence in the middle of the Judiciary Act of 1789, was little-known and almost completely unused until 1980. Following the Second Circuit's decision in *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2d Cir. 1980)—which some courts later interpreted as suggesting a private right of action in the ATS—the rate and scope of ATS litigation exploded. While the ATS is occasionally invoked against individuals or officials accused of violating international law—such as Petitioner Sosa—the vast majority of recent cases have targeted private companies with deep pockets. Foreign plaintiffs and the lawyers and organizations supporting them—often pursuing thinly disguised political agendas—have adopted the statute as a vehicle to embarrass foreign governments and to pressure businesses to abandon operations in targeted nations.

These lawsuits challenge foreign investment that is legal under U.S. law, and embarrass foreign governments the United States counts as friends and allies. ATS lawsuits almost invariably raise highly charged allegations of human rights abuses, generate considerable publicity, and involve enormous potential damages. The very existence of such lawsuits creates risk and poses a growing and significant obstacle to foreign investment by U.S. and multinational companies. ATS litigation is often specifically designed to disrupt the nation's foreign policy, interfering not only with the government's chosen policy on human rights, but also with its trade policy and foreign relations policy in general.

This onslaught of ATS suits has been prompted by a few courts' misinterpretation of the statute. Though Congress never intended the ATS to provide a private right of action,

the Ninth Circuit and other courts not only invented one, but then assigned to that cause of action standards derived from treaties and international agreements that the President and Congress have chosen not to adopt. As a consequence, the ATS has been transformed from its intended role as a jurisdictional provision applicable to a small class of cases into a serious impediment to companies engaged in international trade, investment, and operations, and a major irritant to the United States in its dealings with other nations.

These harms result not from Congress' design, but rather from judicial overreaching. This is judicial lawmaking in an area where the judiciary has neither expertise nor mandate. It strains the constitutional separation of powers and creates practical difficulties for the business community. *Amici* respectfully urge this Court to correct those errors and return the ATS to its proper, jurisdictional role.

ARGUMENT

I. ATS LITIGATION INCREASINGLY INTERFERES WITH FOREIGN INVESTMENT AND FOREIGN RELATIONS.

Litigation under the ATS threatens severe harm, both domestically and internationally, in ways the statute should be construed to avoid.

A. ATS Lawsuits Are A Serious And Growing Concern To U.S. And International Companies.

Over the past decade, scores of U.S. and multinational companies, including many of *amici*'s members, have been sued under the ATS. The suits allege a wide variety of international law violations, and concern conduct all over the world. The suits often have little or no connection to the United States, other than the presence of a defendant that does business (directly or through an affiliate) in this country. While some companies or their affiliates are alleged to have committed violations of the law of nations

directly, more often plaintiffs seek to hold private companies liable for the actions of foreign governments under theories of secondary or vicarious liability.

ATS lawsuits in recent years have included the following:

- A suit by residents of Peru against the U.S. subsidiary of a Mexican corporation for violations of their "'right to life,' 'right to health,' and right to 'sustainable development.'" *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 143 (2d Cir. 2003). The plaintiffs complained that the defendant's copper mining, refining, and smelting operations—operations regulated by and approved by the Peruvian Government—had caused environmental damage amounting to a violation of such international law rights as the "'right of the child to the enjoyment of the highest attainable standard of health.'" *Id.* at 165 (citation omitted).

- A suit against Coca-Cola seeking to hold the company liable for the death of a trade unionist shot by a paramilitary group on the grounds of a local bottling plant which the company neither owned nor managed. *See Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003).

- A suit by Burmese villagers against a U.S. company whose foreign subsidiaries held a minority interest in a gas pipeline in Burma. *See Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part and rev'd in part*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *vacated and reh'g granted en banc*, 2003 WL 359787 (9th Cir. Feb 14, 2003), *submission withdrawn pending decision in this case.* Plaintiffs seek to hold the company liable for "aiding and abetting" human rights abuses by the Burmese military in the vicinity of the pipeline.

- An Indonesian tribal chief's suit against several U.S. mining companies, alleging, among other things, environmental torts, genocide, and "cultural genocide" through interference with the tribe's "right to 'enjoy culture,' . . . right to 'freely pursue' culture, [and] . . . right to cultural development." *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167-68 (5th Cir. 1999).

This list is not exhaustive. ATS lawsuits against corporations have also involved claims challenging the clinical investigation of medications, the adequacy of financial disclosures, and the lease or purchase of properties expropriated by foreign governments.[2] They have extended to industries such as food products, transportation, banking, insurance, pharmaceuticals, chemical manufacturing, and technology.[3] And they have turned on conduct occurring in nations as diverse as Egypt, Nigeria, Papua New Guinea, and Sudan.[4]

Plaintiffs have even used the ATS to revive historical grievances that appeared to have been otherwise settled. One suit sought damages for the tragic 1984 Bhopal, India chemical accident—even though the defendant company had

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[2] *See, e.g., Abdullahi v. Pfizer*, 77 Fed. App. 48 (2d Cir. 2003) (clinical investigation); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995) (financial impropriety); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2001) (expropriation).

[3] *See, e.g., Villeda Aldana v. Fresh Del Monte*, No. 02cv3399 (FAM) (S.D. Fla., dismissed Dec. 12, 2003) (agriculture); *Digwamaje v. IBM Corp. et. al.*, No. 02cv6218 (JES) (S.D.N.Y. filed Aug. 2, 2002) (transportation, banking, chemical manufacturing, and technology).

[4] *Bigio v. Coca-Cola Co., supra* (Egypt); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (Nigeria), *cert. denied*, 532 U.S. 941 (2001); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (Papua New Guinea); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (Sudan).

already settled the claims with the Indian Government.[5] Other plaintiffs have sued companies—ranging from Ford Motor Company to the French national railroad company—for allegedly cooperating in human rights abuses by the Axis powers during World War II.[6] Numerous lawsuits currently consolidated for multidistrict proceedings in the Southern District of New York seek to hold dozens of U.S. and multinational corporations liable under the ATS for doing business in South Africa during the apartheid era.[7] Plaintiffs allege that the mere decision to do business in South Africa violated the law of nations by propping up the apartheid regime.

ATS lawsuits against companies invoke a bewildering variety of purported international law rights. Seeking to impose liability on private companies, plaintiffs (and a number of courts) rely on diverse sources to divine "customary international law," such as:

- Treaties never ratified by the United States, including the American Convention on Human Rights, the International Covenant on Economic Social and Cultural Rights, and the U.N. Convention on the Rights of the Child;[8]

[5] *See Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001).

[6] *See, e.g., Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 332 F.3d 173 (2d Cir. 2003).

[7] *See In re South African Apartheid Litig.*, MDL No. 1499 (JES) (S.D.N.Y.).

[8] American Convention on Human Rights ("American Convention"), Nov. 22, 1969, 1144 U.N.T.S. 123; International Covenant on Economic Social and Cultural Rights ("ICESCR"), opened for signature Dec. 19, 1966, 993 U.N.T.S. 3; United Nations Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess. Supp. No. 49, at 167, U.N. Doc. A/44/25 (1989), 1577 U.N.T.S. 3. *See, e.g., Flores*, 343 F.3d at 161 (ICESCR); *id.* at 164 (American Convention); *id.* at 165 (U.N. Convention on the Rights of the Child).

- Treaties ratified by the United States subject to an express declaration that the treaty is not self-executing, like the International Covenant on Civil and Political Rights;[9]
- Nonbinding United Nations General Assembly resolutions, like the World Charter for Nature and the Universal Declaration of Human Rights;[10]
- Non-treaty declarations, like the Rio Declaration on Environment and Development and the American Declaration of the Rights and Duties of Man;[11]
- *Ad hoc* tribunals, such as the International Criminal Tribunal for the Former Yugoslavia;[12]

[9] International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S. 171 (ratified June 8, 1992). The Senate ratified the ICCPR subject to the United States' declaration that "the provisions of Articles 1 through 27 of the Covenant are not self-executing." 138 Cong. Rec. S4781, S4784 (daily ed. Apr. 2, 1992). *See, e.g., Beanal*, 197 F.3d at 168 n.7 (discussing ICCPR).

[10] World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982); Universal Declaration of Human Rights ("Universal Declaration"), G.A. Res. 217, U.N. Doc. A/810 (Dec. 10, 1948). *See, e.g., Flores*, 343 F.3d at 160-61 & 165 n.36 (World Charter for Nature); *Beanal*, 197 F.3d at 168 n.7 (Universal Declaration).

[11] Rio Declaration on Environment and Development ("Rio Declaration"), U.N. Conference on Environment and Development, Rio de Janeiro, Brazil, June 13, 1992, U.N. Doc. A/CONF. 15 1/5 rev. 1 (1992); American Declaration of the Rights and Duties of Man ("American Declaration"), O.A.S. Res. XXX (1948). *See, e.g., Flores*, 343 F.3d at 169 (discussing American Declaration); *id.* at 161, 169 (discussing Rio Declaration); *Beanal*, 197 F.3d at 167 (same).

[12] *See, e.g., Unocal*, 2002 WL 31063976, at *12.

- The affidavits, books, and articles of "expert" scholars of international law;[13] and
- Strictly regional authorities with no connection to the United States, such as the European Court of Human Rights, and the Agreement Establishing the European Bank for Reconstruction and Development.[14]

B. ATS Lawsuits Harm The Economy By Putting Companies With A U.S. Presence At A Unique And Unfair Competitive Disadvantage.

The growing tide of ATS litigation challenging companies' investments and operations outside of the United States creates a unique but significant risk for companies with a U.S. presence. It is often difficult or impossible to join other parties, many of whom will not be subject to the jurisdiction of United States courts. This is particularly true with regard to foreign sovereigns whose acts are ultimately being challenged by many plaintiffs—but who are protected by sovereign immunity and the act of state doctrine.[15] Evidence necessary for the defense of ATS claims is often located abroad and may be inaccessible.[16]

In addition to the investment risk created by the mere existence of ATS litigation, companies face enormous uncertainty regarding the scope of potential claims under the

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[13] *See generally Flores*, 343 F.3d at 170.

[14] *See, e.g., id.* (European Court of Human Rights); *id.* at 172 n.43 (Agreement Establishing the European Bank for Reconstruction and Development, May 29, 1990, 29 I.L.M. 1077).

[15] *See generally Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (sovereign immunity); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (act of state doctrine).

[16] *See, e.g., Aguinda v. Texaco, Inc.*, 303 F.3d 470, 479 (2d Cir. 2002) (noting inaccessibility of evidence implicating foreign government's role in alleged violations).

statute. Companies find it difficult or impossible to determine what acts may give rise to liability, because courts adjudicating ATS suits have drawn their notions of actionable conduct not only from binding treaties of the United States, but also from treaties the United States has not endorsed, nonbinding pronouncements by international organizations, decisions of *ad hoc* international tribunals, and from the varied and conflicting scholarship that makes up the field. *See generally Flores*, 343 F.3d at 158. Because ATS cases are based upon an implied cause of action without any clear standards of liability, there may be little companies can do to protect themselves against potential claims, short of simply ceasing to do business in the many nations whose human rights practices come up short against evolving Western ideals. Even companies that exercise care to behave responsibly themselves have no safeguard, because lawsuits have been maintained on evolving theories of secondary or vicarious liability for governmental acts. *See, e.g., Unocal*, 2002 WL 31063976, at *13-*17 (applying recently developed criminal aiding and abetting standards derived from *ad hoc* international criminal tribunals).[17]

These factors increase the risk, uncertainty, and cost of overseas operations and investment. The threat of ATS lawsuits can result in higher insurance costs, difficulties accessing capital markets, and negative effects on shareholder confidence and stock prices. The foreseeable result is less investment and trade with developing countries, and less international trade overall.

What is more, the economic downside of ATS litigation uniquely and adversely affects the *U.S.* economy. ATS cases

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[17] In addition, while corporate investment decisions are made for the long term, foreign governments (and their human rights practices) may change suddenly. This means that a company that had chosen to invest in a rights-respecting country may nevertheless find itself subject to ATS suits when the country's government unexpectedly changes.

are, as a practical matter, brought mostly against defendants with a presence in the United States. Those are the defendants over whom personal jurisdiction is most likely obtainable, and from whom judgments are most collectible. They are also, therefore, the entities who absorb ATS-suit related costs. Foreign companies without a U.S. presence, in contrast, need not fear ATS suits, and their associated costs. This means that U.S. companies (or companies with a U.S. presence) are at a significant competitive disadvantage against their foreign competitors—facing unique risks and uncertainty in the planning, financing, and insuring of activities abroad. They either have to absorb these added costs, or cede profitable ventures to other nations' companies.[18]

Already, "more than 50 [multinational corporations] are in the dock; and the damages claimed [in ATS lawsuits] exceeds $200 billion." Gary Clyde Hufbauer & Nicholas K. Mitrokostas, Institute for International Economics, *Awakening Monster: The Alien Tort Statute of 1789*, at 7 (2003) (citation omitted). ATS litigation "could diminish U.S. merchandise trade (imports plus exports) by $50 billion to $60 billion with the target countries," putting "more than 100,000 U.S. manufacturing jobs at risk." *Id.* at 38-39.

Abusive ATS litigation ultimately deters investment by the very companies that are most likely to adhere to high standards of responsible conduct in their operations.[19] U.S. companies are among the most exemplary global corporate

[18] Foreign companies with a U.S. presence have, of course, a third option, equally harmful to the U.S. economy: they can downgrade their U.S. presence, shut down U.S. operations, and shift U.S. jobs overseas.

[19] *See, e.g.*, Letter from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to Judge Louis F. Oberdorfer, July 29, 2002, at 3, *Doe v. Exxon Mobil Corp.*, No. 01-Civ-1357 (D.D.C.) (predicting that foreign companies in Indonesia "would be far less concerned about human rights" than U.S. firms).

citizens, but they can be driven out of the countries that could most benefit from their example and the economic advantages their presence brings.

C. ATS Lawsuits Interfere With Foreign Policy.

Litigation under the ATS exacts a cost not only on this nation's economy, but also on its foreign policy. First, the judicially created cause of action under the ATS allows private plaintiffs to undercut the political branches' carefully chosen policies on human rights, trade, and national security. Second, private ATS lawsuits lead to significant friction with our allies and limit the President's flexibility in conducting foreign affairs. These negative implications of interpreting the ATS to provide a cause of action are severe enough to warn against such a construction.

1. ATS Lawsuits Interfere with Nuanced Policies of the President and Congress.

Although often brought in the name of human rights, ATS lawsuits can become a tool to hold companies liable for the very activities the President and Congress have allowed or even encouraged in the name of human rights. The promotion of human rights abroad is an important national goal—and one *amici* fully support. But wrongful interpretations of the ATS allow private litigants to substitute their own human rights agenda for that of the country's elected officials.

With few exceptions, United States policy is to *increase* international trade, investment, and economic cooperation as a central means of promoting human rights. *See, e.g.*, Remarks by President George W. Bush at Summit of the Americas Working Session (2001), *available at* http://www.whitehouse.gov/news/releases/2001/04/20010423-9.html ("[O]pen trade reinforces the habit of liberty that sustains democracy over the long haul."); Remarks to the Council of the Americas by Peter F. Romero, Assistant

Secretary of State for Western Hemisphere Affairs (2001), *available at* http://usembassy.state.gov/japan/wwwhec0080.html ("Higher [economic] growth in Latin America is not just desirable but imperative for consolidating democracy. . . . To achieve that higher growth . . . no one has a more important role to play than you, the investor[.]").

Depending on the circumstances, the President and Congress employ multifaceted policies to promote human rights in different countries while safeguarding the United States' economic and foreign-policy interests. *See, e.g.*, Colin L. Powell, *The Promise of China Trade*, Wash. Post, June 1, 2001, at A31 ("Trade with China is not only good economic policy; it is good human rights policy and good national security policy."). In the rare cases when Congress and the President have determined that drastic action such as economic sanctions are warranted, they have set clear standards (either by statute or regulation), and concentrated discretion in the Executive to make exceptions when circumstances demand it. *See, e.g.*, Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (imposing specific and limited trade sanctions on South Africa), *modified by* South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, 107 Stat. 1503 (1996) (providing for a partial repeal of the Comprehensive Anti-Apartheid Act, and possible total repeal upon presidential certification that an interim South African government has been elected on a nonracial basis). This represents a political judgment that the national interest is best served by making the process predictable and rational, lessening risk and uncertainty, and enabling quick responses to changing conditions.

ATS lawsuits are often thinly veiled attempts to undercut these careful political decisions. By way of example, the carefully "calibrated" federal sanctions on Burma this Court discussed in *Crosby v. National Foreign Trade Council*, 530

U.S. 363, 377 (2000), were designed to punish rights violations, reward improvement, protect previously made business decisions, and safeguard our national security. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 101(c), 110 Stat. 3009, 3009-121 (1996). Investment prohibitions were to apply to new investments only. This policy not only reflected a clear congressional judgment that the then-existing level of U.S. investment was *desirable* from a human rights standpoint,[20] but also protected prior investors' legitimate business expectations. The sanctions were selective—containing special exceptions for humanitarian assistance, counternarcotics efforts, and promotion of human rights and democracy. *Crosby*, 530 U.S. at 368. The sanctions were flexible—the President was empowered to lift sanctions when he found "measurable and substantial progress," and was instructed to add certain further sanctions if conditions deteriorated. *Id.* There was attention paid to developing a "multilateral" strategy together with other nations, *id.* at 369, and the federal sanctions act provided for periodic reports to keep Congress informed. *Id.* Finally, the act authorized the President to *waive*, "'temporarily or permanently'" any or all of the sanctions if he determined that to be in the "'national security interests of the United States.'" *Id.* (citation omitted).[21]

The ATS, which puts human rights policy in the hands of private plaintiffs, has been employed to undercut this

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[20] *See* 142 Cong. Rec. S8810 (daily ed. July 25, 1996) (statement of Sen. Breavy) ("Although the United States accounts for only ten percent of all foreign investment in Burma, allowing U.S. businesses to operate there will enable us to continue raising our concerns over human rights. I believe a U.S. voice in this process is critical if we are ever going to see real change in Burma.").

[21] This presidential waiver power was not just incidental; rather, it was a core part of the congressional scheme. *See Crosby*, 530 U.S. at 375 (mentioning the President's power as "most significant[ ]").

carefully crafted scheme. In one still-pending case, *Doe v. Unocal Corp.*, *supra*, Burmese villagers sought an injunction directing Unocal to cease its participation in an existing gas pipeline in Burma. Even though that very investment was permitted by the federal sanctions act—and lauded by members of Congress who voted for the act[22]—plaintiffs have invoked the ATS in an attempt to force the company's withdrawal. *Unocal*, 67 F. Supp. 2d at 1145.

Such litigation undercuts the carefully calibrated mix of blandishments and penalties the political branches use to achieve desired results in the international arena. Even where the policy of the United States is to encourage investment in developing nations as a means of promoting human rights, businesses will hesitate to invest because of the growing threat of ATS liability—making this nation's human rights policy all stick and no carrot.[23] The implied cause of action under the ATS places investors at risk of being sued for foreign governments' alleged abuses even if such investments were made with the permission, or the encouragement, of the U.S. government. In short, a judicially invented cause of action under the ATS allows those who have lost the political battle over sanctions to

[22] 142 Cong. Rec. S8809 (daily ed. July 25, 1996) (statement of co-sponsor Sen. Feinstein) (discussing the positive impacts arising in Burma from Unocal's investment there); *id.* at S8749-50 (statement of Sen. Johnston) ("I can tell you, Mr. President, that the President of Unocal—an American—it is better to have him in there than to have only the French because the French and the Europeans have never really helped on human rights matters. . . . When you have a country that has been so sealed off from Western influences, from civilizing influence, from moderating influences all these years, it is important to let the light in—the cleansing light of democracy, the cleansing light of Western civilization, the dynamic forces of the free market.").

[23] *Cf. Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2393 (2003) ("The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves.").

achieve their ultimate goal—chilling investment in targeted countries—through judicial means.

2. ATS Lawsuits Undermine the President's Ability to Conduct Foreign Policy and Resolve International Disputes.

Private suits under the ATS "hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398, 423 (1964).

First, ATS suits irritate our allies and threaten a range of U.S. programs dependent on international support. *See, e.g.*, Letter from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to Judge Louis F. Oberdorfer, July 29, 2002, at 3, *Doe v. Exxon Mobil Corp.*, No. 01-Civ-1357 (D.D.C.) (stating that Indonesia's negative reaction to an ATS lawsuit "could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform").

ATS suits can wreak havoc with vital foreign investment in nations struggling to recover from past misrule. Currently pending lawsuits against companies that did business in apartheid-era South Africa with the active encouragement of the United States and other governments, seek billions of dollars.[24] *See In re South African Apartheid Litigation*,

[24] The South African lawsuits belatedly challenge U.S. policy that *encouraged* U.S. business activity in South Africa (except for *specific* activities barred by statute) as a way of undermining apartheid through constructive engagement. In the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 203(b)(1), 100 Stat. 1086, 1096, Congress recognized and "applaud[ed]" American corporations whose codes of conduct aimed to aid South African non-whites in "gaining their rightful place in the South African economy."

MDL No. 1499 (JES) (S.D.N.Y.). Not surprisingly, the government of South Africa has strenuously objected to these lawsuits, which "disrupt [South Africa's] own efforts to achieve reconciliation and reconstruction," and undercut South Africa's deliberate decision to "avoid . . . apartheid trials and any ensuring litigation." Decl. of Pennuel Mpapa Maduna, Minister of Justice and Constitutional Development of the Republic of South Africa, July 11, 2003, at 2 & 8, filed in *In re South African Apartheid Litig.*, *supra.*

Reading a cause of action into the ATS also hamstrings the President's flexibility in conducting foreign policy—and especially his ability to negotiate an end to international conflicts that create human rights difficulties. By offending foreign governments and interfering with conflict resolution mechanisms, ATS suits may ultimately perpetuate and exacerbate human rights problems.[25] As this Court noted last year, concerns over civil liability can be a significant impediment to resolving conflicts. *See Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2389 (2003). In *Garamendi*, this Court struck down a California statute that conflicted with a presidential agreement designed to address private claims stemming from World War II-era Nazi deprivations. Noting the importance of the executive agreement at issue in that case, *Garamendi* emphasized the importance of settling financial claims, as part of ending conflicts. Assurances against financial liabilities may be a necessary *quid pro quo* for ending serious international conflicts. *See id.* at 2390 ("[C]laims remaining in the aftermath of hostilities may be 'sources of friction' acting as an 'impediment to resumption of friendly relations.'") (citation omitted). And this need to settle war-related claims extends to public and private

[25] *See, e.g., Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1181 (C.D. Cal. 2002) (noting the State Department's position that "continued adjudication of this lawsuit 'would risk a potentially serious adverse impact'" on efforts to end a 10-year civil war).

liabilities alike: "[U]ntangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments." *Id.* at 2387. The President's efforts to engage in diplomacy will inevitably suffer if foreign officials fear that they (or companies investing in their countries) can be sued under the ATS for past conduct.[26]

In sum, ATS lawsuits impose substantial economic costs and create significant conflicts with the nation's foreign policy—effects Congress surely could never have imagined, much less intended, when it enacted a jurisdictional provision 200 years ago. As the next part points out, these costs are directly traceable to the fundamental mistake, made by the Ninth Circuit and other courts, of reading a cause of action into a statutory provision that in fact creates nothing other than jurisdiction.

II. THE ATS PROVIDES FOR "JURISDICTION" ONLY AND CONTAINS NO PRIVATE CAUSE OF ACTION.

The ATS has no express cause of action. The statute, now codified at 28 U.S.C. § 1350 (2000), provides that

> [t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

On its face, the language does one thing and one thing only: it vests courts with jurisdiction over a certain class of cases—torts committed in violation of the law of nations or a

[26] *See, e.g., In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994).

treaty of the United States. The statute does not explicitly go further to create a cause of action. Therefore any right to sue under the ATS does not come from the language of the statute. Instead, it either must be read into the statute as an implied right of action or must come from an extrastatutory source.

Reading the ATS to contain an implied cause of action is clearly wrong. There is a presumption against implied remedies. "'[A]ffirmative' evidence of congressional intent must be provided *for* an implied remedy, not against it, for without such intent 'the essential predicate for implication of a private remedy simply does not exist.'" *Alexander v. Sandoval*, 532 U.S. 275, 293 n.8 (2001) (citation omitted). Given the harmful consequences of ATS lawsuits detailed above, as well as the textual, historical, and constitutional concerns discussed below, there is simply no reason to infer a private cause of action in the ATS.

A. The Language, Structure, And Context Of The ATS All Make Clear That Congress Did Not Mean To Create A Cause of Action.

Throughout the nation's history, Congress has used language much like that in the ATS precisely to confer "jurisdiction." The Judiciary Act of 1789, of which the ATS is a part, "in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions." *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951). In its original enactment in chapter 20, section 9 of the first Judiciary Act, the ATS appeared in the middle of a long list of other clearly jurisdictional provisions. It would be strange

to suppose that Congress had intended to imply a cause of action for the ATS alone out of all these provisions.[27]

This Court has held similarly worded statutes to confer jurisdiction only. For example, the Tucker Act provides that "[t]he . . . Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress." 28 U.S.C. § 1491. But that statute is "only a jurisdictional statute," which "does not create any substantive right," but rather confers jurisdiction over cases where the right involved has independently arisen. *United States v. Testan*, 424 U.S. 392, 398 (1976). Congress also used similar language in section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, which provides that "[t]he district courts . . . shall have exclusive jurisdiction of violations of" the securities laws of the United States. Tasked with interpreting the scope of that language—nearly identical to the language used in the ATS—this Court was quite clear in holding that it merely "grants jurisdiction to the federal courts," but "creates no cause of action of its own force and effect." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979). Just as here, "[t]he source of plaintiffs' rights must be found, *if at all*," in a substantive provision of law, not in the jurisdictional statute. *Id.* (emphasis added). These cases confirm what should already be clear from the text: that the ATS' grant of jurisdiction does not by itself create a cause of action.

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[27] Congress' subsequent recodifications of the ATS reinforce this conclusion. After the original enactment in 1789, Congress three times recodified the ATS, each time placing the provision in the chapter addressing the jurisdiction of the district courts. *See* Rev. Stat. § 563, Sixteenth (2d ed. 1878) (part of ch. 3 ("District Courts—Jurisdiction")); Judicial Code of 1911, Pub. L. No. 61-475, § 24, Seventeenth, 36 Stat. 1087, 1093 (1911) (part of ch. 2 ("District Courts—Jurisdiction")); Title 28, Judiciary and Judicial Procedure, Pub. L. No. 80-773, § 1350, 62 Stat. 869, 934 (1948) (part of ch. 85 ("District Courts; Jurisdiction")).

The structure of the ATS also suggests it contains no private cause of action. The ATS applies equally to suits arising from violations of "the law of nations" and suits arising from violations of "treat[ies] of the United States." 28 U.S.C. § 1350. The two types of violations are in statutory parity. Thus, if the ATS supplies an independent right of action for violations of the law of nations, it must also supply an independent right of action for "violations of . . . a treaty of the United States." *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 820 (D.C. Cir. 1984) (Bork, J., concurring). But this cannot be. Such a reading would make all U.S. treaties self-executing—a result incompatible with settled law. *See id.* (the conclusion that the ATS supplies an independent right of action for treaty violations "stands in flat opposition to almost two hundred years of our jurisprudence, and it is simply too late to discover such a revolutionary effect in this little-noticed statute").[28] Indeed, such a reading of the ATS would not only abrogate the well-established rule that treaties are not self-executing, but would abrogate the rule in a particularly bizarre and unfair manner—making all treaties self-executing, but only for the benefit of *alien* plaintiffs. *See Al Odah v. United States*, 321 F.3d 1134, 1146 (D.C. Cir.) (Randolph, J., concurring) ("To hold that the Alien Tort Act creates a cause of action for treaty violations . . . would be to grant aliens greater rights in the nation's courts than American citizens."), *cert. granted*, 124 S. Ct. 534 (2003).

In short, the ATS' language, structure and context make clear that Congress did not intend it to create a cause of action.

[28] *See United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000) (en banc) ("[T]reaties do not generally create rights that are privately enforceable in the federal courts.").

B. The Ninth Circuit's Interpretation Of The ATS Gives Rise To Grave Constitutional Questions.

Even if there were any ambiguity in the statute's language, structure, and context, it would still not be proper to find a cause of action in the statute because of the serious constitutional infirmities that would result. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (statutes should be construed to avoid raising serious constitutional questions where such a construction is fairly possible).

Under the Constitution, it is not for the courts to define violations of the law of nations. Rather, the Constitution explicitly assigns that power to Congress. *See* U.S. Const. art. I, § 8, cl.10, (giving Congress the power "to define and punish . . . Offenses against the Law of Nations"). Such explicit constitutional assignments of power to the three distinct branches of government are not aspirational. Rather, as the fundamental means by which the Constitution attempts to ensure proper balancing to achieve a democratic government, textual powers assigned to a particular branch may not be shifted from one branch to the other. *See Clinton v. City of New York*, 524 U.S. 417, 438-40 (1998). Where "[e]xplicit and unambiguous provisions of the Constitution prescribe and define" "just how [governmental] powers are to be exercised," the constitutional procedures must be followed with precision. *INS v. Chadha*, 462 U.S. 919, 945 (1983). Thus, Congress may not delegate to the Judiciary its textually assigned power to "define and punish . . . Offenses against the Law of Nations," and the statute should be interpreted to avoid such an unconstitutional construction.

Similarly, the power to "make Treaties" is explicitly given to the President, "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. To take the substance of the ATS action from treaties that the President has not signed and the Senate has not ratified would be an unconstitutional circumvention of the Article II plan.

Cf. Chadha; *New York*. Hence, it is wrong to read the ATS as conferring binding status on treaties that the President has not signed, or the Senate has not ratified. And it is likewise error for U.S. courts to use the ATS as a mechanism of implementing the human rights standards of, for instance, the European Convention and the African Charter, as the Ninth Circuit did here. Pet. App. 30 n.18. The President and Senate did not and could not delegate their treaty power to these international organizations. "To have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring).

Reading a cause of action into the ATS results in troubling Article III implications as well. Some ATS suits (including this one) feature aliens suing aliens—making the suits ineligible for federal diversity jurisdiction. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492 (1983). For the suits to be maintainable, therefore, they would have to fall under another head of Article III jurisdiction—probably jurisdiction for "Cases . . . arising under . . . the Laws of the United States." U.S. Const. art. III, § 2, cl. 1. But, for reasons more fully explained in the Brief of Washington Legal Foundation, et. al. as *Amici Curiae*, at 14-19, international law itself, without some congressional action incorporating it into positive domestic law, is *not* law of the United States for Article III purposes. *See also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 596-619 (2002). Reading the ATS as permitting suits based only on generalized international law, with no further *specification* by statute or treaty, would mean the

statute attempted to provide jurisdiction well beyond the Article III limits.[29]

Given the seriousness of these constitutional issues, it would be especially misguided to read a cause of action into the ATS.[30]

III. THE ATS CONFERS JURISDICTION ONLY WHERE CONGRESS HAS PROVIDED A CAUSE OF ACTION BY STATUTE OR TREATY.

That the ATS does not create a cause of action does not mean that the statute is without effect. Rather, it means that the ATS becomes relevant whenever Congress has separately provided a cause of action, by a properly ratified treaty or a properly enacted statute. What the ATS does not comprehend, on the other hand, are the sorts of claims made by the plaintiff in this case, and the plaintiffs in most other ATS cases—claims based on alleged violations of *general* international law never codified by a statute or treaty of the United States.[31]

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[29] This does not mean, however, that the district court lacked Article III jurisdiction in this case. The lower court properly had *supplemental* jurisdiction to hear the claims against Sosa, based on its jurisdiction to hear the closely related claims against the United States and its officers. *See* 28 U.S.C. § 1367.

[30] Finally, international relations are primarily the concern of the political branches. To put the courts in charge of applying vague international law standards is to put the courts in a position where they will inevitably conflict with the political branches. It is this possibility of inter-branch friction that has led some judges to declare lawsuits under the ATS to be nonjusticiable political questions. *See Tel-Oren*, 726 F.2d at 823 (Robb, J., concurring); *Alvarez-Machain*, Pet. App. 108 (Gould, J., dissenting). Even if the statute is justiciable, the Court should not extend its reach so as to maximize separation of powers concerns—which is what happens when plaintiffs sue corporations under the ATS for investments that the political branches approved of.

[31] The modern, individual-rights conception of international law was unknown to the founders. At the time the ATS was originally enacted,

When Congress wants to expand the class of cases for ATS jurisdiction, the way to do that is by enacting a cause of action, creating the substantive claims over which the general jurisdiction will rest.

Indeed, the Congress that passed the ATS would have been aware of provisions in at least four already-ratified treaties providing individuals wrongly injured by privateers such causes of action. For instance, the 1785 Treaty of Amity and Commerce between the United States and Prussia was designed in part to protect each nation's ships from the other nation's privateers. *See* Treaty of Amity and Commerce, July 9, 1785, U.S.-Prussia, art. 15, 8 Bevans 78, 83. The Treaty created a right for individuals injured in violation of its terms to receive compensation for damages from the person committing the tort:

> [A]ll persons belonging to any vessel of war, public or private, who shall molest or injure in any manner whatever the people, vessels, or effects of the other party, shall be responsible in their persons and property for damages and interest . . . .

Id. Similar language creating a private right of action was present in the 1782 Treaty of Amity and Commerce with the Netherlands,[32] the 1778 Treaty of Amity and Commerce with France,[33] and the 1783 Treaty of Amity and Commerce with

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the "law of nations" vested rights *not* in individuals, but in nations. *See Banco Nacional*, 376 U.S. at 422-23.

[32] Treaty of Amity and Commerce, Oct. 8, 1782, U.S.-Netherlands, art. 13, 10 Bevans 6, 11 ("[I]f they act to the contrary, they shall be, upon the first complaint, which shall be made of it, being found guilty, after a just examination, punished by their proper Judges, and, moreover, obliged to make satisfaction for all damages and Interests thereof, by reparation, under pain and obligation of their Persons and Goods.").

[33] Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-France, art. 17, 7 Bevans 763, 769 ("[I]f they act to the contrary, they shall be punished and shall moreover be bound to make Satisfaction for all Matter

Sweden.[34] *See generally* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445, 470 (1995). In enacting the ATS, the First Congress knew that the statute would provide jurisdiction in the newly created federal courts for cases arising from these treaty provisions—as well as from any other self-executing, private-right-creating treaties that might be ratified later under Article II.[35]

More recently, Congress has shown its ability to provide an express *statutory* cause of action within the jurisdiction of the ATS by enacting the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note. Unlike the ATS, the TVPA *explicitly* gives aliens and citizens alike a right to sue. *See id.* § 2(a) (stating that a torturer "shall, in a civil action, be liable for damages to [the victim]"). The TVPA addresses a specific, and specifically defined rights violation. *See id.* § 3 (defining torture and extrajudicial killing). The statute contains an exhaustion requirement, making U.S. courts a last resort, rather than a first one. *Id.* § 2(b) ("A court shall

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of Damage, and the Interest thereof, by reparation, under the Pain and obligation of their Person and Goods.")

[34] Treaty of Amity and Commerce, Oct. 8, 1782, U.S.-Sweden, art. 15, 11 Bevans 710, 716. ("[I]f they act to the contrary, having been found guilty on examination by their proper judges, they shall be bound to make satisfaction for all damages and the interest thereof, and to make them good under pain and obligation of their persons and goods.")

[35] Note that, at the time of its enactment, it was necessary to add the ATS for there to be jurisdiction over many of these claims. Today, jurisdiction over such claims would lie under the general federal question statute, 28 U.S.C. § 1331. But there was no such general federal question statute until 1875. *See* 13B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3561 (2d ed. 1984). Because the 1789 Judiciary Act did not contain general federal question jurisdiction, and because diversity jurisdiction in suits between an alien and a citizen then required a relatively steep ($500) amount in controversy, the ATS was necessary to provide jurisdiction over suits by an alien against a U.S. citizen, where the amount in controversy was less than $500.

decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."). And the TVPA contains an explicit statute of limitations that represents Congress' judgment on how to balance victims' right to redress against interests of finality. *Id.* § 2(c) (10-year statute of limitations). The specificity and clarity of the TVPA stand in stark contrast to the vague implied cause of action some claim for the ATS.

Indeed, the very existence of the TVPA shows that the ATS should not be read as creating a cause of action itself. If the ATS provided a private cause of action for violations of the law of nations then Congress would have had no reason to enact the TVPA as it did, since many of its provisions would be rendered unnecessary and redundant. *See FCC v. Nextwave Pers. Communications, Inc.*, 537 U.S. 293, 302 (2003) (courts should reject interpretations that render parts of a statute superfluous). The ATS should be interpreted as conferring jurisdiction only, with any cause of action provided by the later statute.[36]

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[36] Needless to say, the legislative history of the TVPA cannot be read to expand the reach of the earlier enacted ATS. "[T]he interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185 (1994) (finding a later Congress' committee report of no consequence in determining the existence of an aiding and abetting cause of action under the securities laws); *see also Pierce v. Underwood*, 487 U.S. 552, 566 (1988) (rejecting committee report's view of a previously enacted statute's proper interpretation, because "it is the function of the courts and not the Legislature . . . to say what an enacted statute means"). If Congress wants to clarify previously enacted provisions and thereby create new law, it must do so not by writing committee reports, but rather through the constitutionally authorized mechanism of bicameralism and presentment. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 601 n.4 (1985); *Chadha*, 462 U.S. at 954.

That Congress can and does expressly create causes of action by treaties and by statutes like the TVPA counsels against reading the statute to contain a cause of action defined by the plethora of other, non-congressionally-sanctioned sources that courts like the Ninth Circuit have all too often relied on. If Congress has chosen not to provide a substantive cause of action, the void cannot be filled in by the "policy-driven or theoretical work of advocates that comprises a substantial amount of contemporary international law scholarship." *Flores*, 343 F.3d at 171. Nor can the nonbinding declarations of the United Nations General Assembly provide what Congress has not chosen to provide. *Id.* at 165. And finally, courts cannot derive the substantive law for human rights actions from treaties that the United States has chosen not to ratify, or that the United States considers non-self-executing. *See Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring). Actions under the ATS must be based on the duly ratified treaties and duly enacted statutes of Congress. By this means alone can companies make informed investment decisions in harmony with the foreign policy goals of the United States.

* * *

Over the past decade, plaintiffs have relied on the ATS to make up for the political branches' perceived shortcomings in promoting human rights abroad. But the "decision about the right degree of pressure to employ," *Crosby*, 530 U.S. at 380, is a delicate one. Human rights victims and their supporters are better advised to direct their attentions to the political branches directly, rather than twisting a 200-year-old statute beyond its rational limits. When, where, and how best to promote human rights is, after all, a political decision that must take into account a wide variety of often competing goals and interests. *Cf. Banco Nacional*, 376 U.S. at 436 ("If the political branches are unwilling to exercise their ample powers to effect compensation, this reflects a judgment of

the national interest which the Judiciary would be ill-advised to undermine indirectly.").

Recent events point out how troubling is the conclusion that Congress authorized any cause of action by the ATS. The existence of these lawsuits is an increasing irritant in our affairs with other nations. They conflict with and undermine other recent congressional and presidential policies. And they put U.S. companies, and multinationals with a U.S. presence, at a unique competitive disadvantage in the international marketplace. To believe that Congress created anything more than a jurisdictional grant when it included the ATS in the first Judiciary Act strains credulity. *Amici* respectfully urge this Court to restore the ATS to its proper place.

CONCLUSION

For the reasons given above, the decision of the Ninth Circuit should be reversed.

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IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Manufacturers (the "NAM") is the nation's largest broad-based industrial trade association. The NAM represents 14,000 member companies (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and in all 50 states. Many of its members have operations in foreign countries.

Over the past decade, corporations have been sued under 28 U.S.C. § 1350, the provision generally known as the Alien Tort Statute ("ATS"), by plaintiffs alleging that the companies have violated either alleged norms of customary international law not assented to by the United States or treaties ratified by the U.S. but declared to be "non-self-executing."[2] As evidence of the purported norms of customary international law on which they rest their cases, plaintiffs often cite treaties, conventions, and covenants that have not been universally ratified, that are non-self-executing, or that contain only broad and indefinite aspirational goals.[3] They also rely on non-binding UN General Assembly declarations, other multinational declarations of principle, and affidavits by scholars that consist of speculations about what the law ought to be rather than accurate descriptions of the actual practices and

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[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and its members made any monetary contribution to its preparation or submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

[2] While 28 U.S.C. § 1350 is also commonly referred to as the Alien Tort Claims Act or "ATCA," as it is in the Ninth Circuit decision below, this name misleadingly analogizes Section 1350 to the Federal Tort Claims Act, which expressly authorizes private suits for damages against the United States. The term "Alien Tort Statute" is also imperfect, because it suggests that the provision was originally enacted as a stand-alone statute, rather than as a clause of Section 9 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 76.

[3] The Brief for the National Foreign Trade Council *et al.* as *amici curiae* describes (at 6–8) some of the representative cases.

legal obligations of States. See, *e.g.*, *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003). Often, a corporate defendant is not alleged to have directly injured the plaintiffs but instead to have aided and abetted or otherwise facilitated unlawful acts by army personnel or other foreign government officials.

A number of these cases remain pending, the courts having denied motions to dismiss for failure to state a claim. Even if these cases are ultimately dismissed on motions for summary judgment or the defendants are found not liable after trial, defendants in the meantime will have suffered great expense and disruption to their businesses. As amplified in the Brief of the National Foreign Trade Council *et al.* as *amici curiae* in support of petitioner, these suits are imposing significant economic costs on the US economy.

This case does not involve any multinational corporations. *Amicus* has no direct interest in the legality of an alleged arbitrary detention by an agent of the United States in Mexico, nor does *amicus* express a view on the legality of such detentions. Nevertheless, *amicus* has a strong interest in the correct interpretation of the ATS and in standards for determining whether particular conduct violates customary international law for purposes of suits under that statute.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Briefs for Petitioner, the United States, and the National Foreign Trade Council *et al.* as *amici curiae* in support of Petitioner all present persuasive reasons why the ATS does not create a private right of action for damages for violations of international law. We agree that the ATS is what it appears to be on its face—a *jurisdictional* statute—and do not repeat those arguments.[4]

[4] The ATS, 28 U.S.C. § 1350, provides in its entirety: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Whether this court holds that the ATS provides a cause of action or is, instead, only jurisdictional, the text of the statute makes clear that courts in ATS cases must determine, as a threshold matter, if the complaint alleges a violation of "the law of nations." As many courts have noted, this can be a difficult task. *E.g.*, *Flores*, 343 F.3d at 154.

In Part I of the argument, *amicus* urges that no norm of customary international law should be enforceable in United States courts unless the norm (a) is "universal," which it cannot be unless the United States has assented to it; (b) is clearly obligatory with respect to the defendant, which it cannot be if it is merely aspirational or not intended to govern the conduct of the defendant; and (c) provides reasonably clear and specific standards of conduct.

In Part II, *amicus* provides concrete examples of the ways in which the erroneous assumption that the ATS provides a private cause of action has led to incorrect rulings harmful to multinational corporations on many substantive issues that routinely arise in ATS cases, including choice of law, statute of limitations, exhaustion of local remedies, retroactivity, and standing. A ruling that the ATS creates no cause of action would prevent those important issues from being decided on the erroneous assumption that Congress addressed them in the ATS.

ARGUMENT

I. A Norm of Customary International Law Must Have the Assent of the United States, Be Obligatory, and Be Specific To Be Enforceable in United States Courts.

This case affords the Court an opportunity to give much needed guidance to the lower courts on how to determine actionable rules of international law.[5] In its decision below, the Ninth Circuit stated that it was careful "to limit actionable

[5] Virtually all of the lower courts now use the term "customary international law" instead of the term "law of nations," the language of the ATS. Conventionally, "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

violations to those international norms that are 'specific, universal, and obligatory.'" *Alvarez-Machain* v. *United States*, 331 F.3d 604, 612 (9th Cir. 2003) (*en banc*), Pet. 1a, 10a (citation omitted). "This formulation," the court added, "is in keeping with the narrow scope of ATCA jurisdiction and the general practice of limiting judicial review to those areas of international law that have achieved sufficient consensus to merit application by a domestic tribunal." *Id.* The recent decision of the Second Circuit in *Flores*, while using slightly different words, applies the same factors as the Ninth Circuit in demonstrating the same intent to limit court enforcement of purported violations of customary international law. As explained by the Second Circuit, "those *clear and unambiguous* rules by which States *universally abide*, or to which they accede, *out of a sense of legal obligation* and mutual concern, constitute the body of customary international law." 343 F.3d at 158 (emphasis added).

In what follows, *amicus* shows why the three factors identified by the Second and Ninth Circuit are important and how they should be interpreted. We also show that the Ninth Circuit erred in applying the factors. Notably, the Ninth Circuit declined to rule that a norm of customary international law must have the assent of the United States to be "universal"—a failure that sent the Ninth Circuit off on an examination of treaties not ratified by the United States. Furthermore, the Ninth Circuit failed to address correctly whether the norm was obligatory by relying inappropriately on aspirational norms, UN declarations, and a non-self-executing treaty ratified by the United States.

Requiring the assent of the United States will satisfy the universality requirement and, at the same time, is likely to result in a statute or self-executing treaty that satisfies the requirement that a norm be obligatory by making clear who is bound by it. Moreover, if the United States expresses its assent by incorporating the norm of international law into a statue or self-executing treaty, the specificity requirement is

much more likely to be satisfied, and potential defendants in ATS cases are much more likely to have fair notice of precisely what conduct is and is not permissible.[6]

A. A Norm of Customary International Law Must Have the Assent of the United States To Be Enforceable in United States Courts.

Amicus agrees with the principal dissent below that, in determining whether the conduct alleged in a complaint violates customary international law, a court should begin by asking whether the United States has assented to the alleged norm and should end its inquiry if the United States has not assented.[7] That is, a purported norm of international law cannot be deemed "universal" by United States courts if the United States has not assented to it.[8]

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[6] Other briefs in this case argue that the term "law of nations" as used in the ATS should be limited to the accepted meaning of that term in 1789, following the lead of Judge Bork's concurring opinion in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 798 at 813–16 (D.C. Cir. 1984). *Amicus* supports those arguments, but focuses here on the correct application of the three factors addressed above.

[7] As we have seen, both the Ninth and Second Circuits have ruled that a norm of customary international law must "be universal," a ruling that would appear on its face to make the inquiry substantially easier. The Ninth Circuit, however, took issue with the rule urged by the principal dissent that, in order for a norm to be deemed universal, it was essential to show that the United States assented to the norm. 331 F.3d at 620, Pet. 25a, n.15. The principal dissent urged that courts in ATS cases should take as their starting point of analysis the rule that "[a] norm to which the political branches of our government have refused to assent is not a universal norm." 331 F.3d at 650, Pet. 81a (O'Scannlain, J., dissenting).

[8] This requirement does not mean that the United States cannot violate a norm of customary international law. If the United States has assented to a norm of customary international law, then a United States court could find, in an appropriate case, that an agency, official, or employee of the United States has violated that norm. See *Flores*, 343 F.3d at 154 ("Of course, States need not be universally successful in implementing the principle in order for a rule of customary international law to arise. If that were the case, there would be no need for customary international law."). The often-cited case of *The Paquete Habana*, 175 U.S. 677 (1900), is an

Two sound reasons support this approach. The first is the one articulated by the Second Circuit in *United States* v. *Yousef*, 327 F.3d 56 (2d Cir.), *cert. denied*, 124 S. Ct. 353, 492 (2003): if a rule has not gained the assent of a country with the geopolitical significance of the United States, it can hardly be said to be universal. The second reason strikes closer to home. United States courts should not encroach upon the powers of the political branches by enforcing rules to which the United States has not assented. As the Brief for the United States explains, for a court to enforce a rule not reflected in a congressional statute, a treaty ratified by the United States, or United States practice raises grave separation of powers concerns. The Constitution grants Congress the power "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Art. I, § 8, cl. 10. As Judge Randolph recently stated, in the light of the history of the Define and Punish Clause, it is "abundantly clear that Congress—not the Judiciary—is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts." *Al Odah* v. *United States*, 321 F.3d 1134, 1147 (D.C. Cir.) (concurring opinion), *cert. granted*, 124 U.S. 534 (2003) (Nos. 03-334 & 03-343). Moreover, in one of the few cases in this Court in which jurisdiction was claimed under the ATS, *O'Reilly de Camara* v. *Brooke*, 209 U.S. 45 (1908), the Court (per Holmes, J.) found it "plain" that it is "impossible" for the courts to declare an allegedly unlawful act of a government official to be a tort in violation of the law of nations, within the meaning of the ATS, "when the Executive, Congress and the treaty-making power all have adopted the [official's allegedly unlawful]

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example of this principle. See *id.* at 712 (stating: "The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels," although ruling that the capture at issue, of such a vessel by a United States gunboat, violated the rule.).

act." *Id.* at 52. This ruling points squarely towards requiring United States assent.

In determining this threshold question of United States assent, courts should not consider international instruments that the United States has not approved. As the Second Circuit stated in *Flores*,

> "The evidentiary weight to be afforded to a given treaty varies greatly depending on (i) how many, *and which*, States have ratified the treaty, and (ii) the degree to which those States actually implement and abide by the principles set forth in the treaty." 343 F.3d at 163 (emphasis added).

See also *United States v. Yousef,* 327 F.3d at 92 n.25.

Thus, the Ninth Circuit erred in the course of ruling that arbitrary detention violated international law when it looked not just to the International Covenant on Civil and Political Rights ("ICCPR"),[9] which the United States has ratified, but also to three regional conventions that the United States has not ratified.[10] The same error has been committed in other cases, including, for example, *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 317 (S.D.N.Y. 2003) (denying motion to dismiss) (in holding that a corporation could be liable, relying on five conventions, none of

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[9] S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (opened for signature Dec. 16, 1966, entered into force Mar. 23, 1976, entered into force for the U.S. Sept. 8, 1992) (ratified by the U.S. with five reservations, five understandings, four declarations, and one proviso, 138 Cong. Rec. 8070–71 (1992)).

[10] The American Convention on Human Rights, 1144 U.N.T.S. 143 (opened for signature Nov. 22, 1969, entered into force July 18, 1978); the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (opened for signature Nov. 4, 1950, entered into force September 3, 1953); and the African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (opened for signature June 27, 1981, entered into force Oct. 21, 1986). 331 F.3d at 621, Pet. 26a, n.17.

which was ratified by the United States,[11] and one convention that never went into effect for any country[12]).

Determining United States assent as a threshold matter is not only faithful to the notion of universality that underlies customary international law and our own constitutional separation of powers concerns, but also has the practical virtue (as the principal dissent below recognized) of obviating the need in many instances for United States courts to engage in substantially more difficult inquires, including whether the norm is obligatory rather than merely aspirational, even though the United States has not made it so, and whether it is sufficiently

[11] In order of citation in the opinion: Convention Concerning the Application of the Principles of the Right to Organise and To Bargain Collectively (ILO No. C98) (opened for signature July 1, 1949, entered into force July 18, 1951); Convention on Third Party Liability in the Field of Nuclear Energy (Org. for Econ. Co-operation. & Dev.), as amended, 956 U.N.T.S. 251 (opened for signature July 29, 1960, entered into force Apr. 1, 1968); International Convention on Civil Liability for Oil Pollution Damage (Inter-Governmental Maritime Consultative Org.), 973 U.N.T.S. 3 (opened for signature Nov. 29, 1969, entered into force June 19, 1975) (erroneously cited by the court to 26 U.S.T. 765, the citation for a different treaty ratified by the U.S.); Vienna Convention on Civil Liability for Nuclear Damage (Int'l Atomic Energy Agency), 1063 U.N.T.S. 265 (opened for signature May 21, 1963, entered into force Nov. 12, 1977); Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Inter-Governmental Maritime Consultative Org.), 974 U.N.T.S. 255 (opened for signature Dec. 17, 1971, entered into force July 15, 1975). The dangers that lurk if courts do not focus on assent by the United States are especially dramatic in the area of labor standards, where the International Labour Organization has adopted 185 conventions over the years, many of which could be invoked by plaintiffs as norms of customary international law against corporate defendants. Yet the United States has ratified only 14 of those conventions. Current information about International Labour Organization conventions and the status of ratifications is available on its website, http://www.ilo.org.

[12] Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 16 I.L.M. 1450 (opened for signature Dec. 17, 1976, insufficient signatures for entry into force). See http://sedac.ciesin.org/entri/register/reg-092.rrr.-html.

specific, even though the United States has not addressed the matter.[13] We turn now to these two issues.

B. A Norm of Customary International Law Must Be Obligatory To Be Enforceable in United States Courts.

As the Ninth and Second Circuits recognize, for an alleged norm of international law to be enforceable in United States courts, the international instruments or practices upon which the courts rely must show that the norm is obligatory, as opposed to merely aspirational.

For example, the Universal Declaration of Human Rights[14] was intended by its drafters to be aspirational, not to set out legal norms binding on any State or individual. The Universal Declaration itself states that it was proclaimed

> "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both

[13] In this discussion, we have not specifically addressed "*jus cogens*" norms. See 331 F.3d at 612–14, Pet. 11a–13a. As the Ninth Circuit noted, "'[M]ore authority exists for the category of *jus cogens* than exists for its particular content.'" 331 F.3d at 614, Pet. 13a (quoting Ian Brownlie, *Principles of Public International Law* 516–17 (5th ed. 1998)). Moreover, this case does not appear to concern any norms that are candidates for *jus cogens* status. See Restatement (Third) of the Foreign Relations Law of the United States § 102, Reporters' Note 6 (1987). Accordingly, we do not discuss the concept further, except to point out that it is particularly difficult to imagine a norm of international law achieving the status of a *jus cogens* norm without the assent of the United States (or other countries of similar stature) or to justify a United States court finding or applying such a norm in the face of dissent by the political branches.

[14] G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 1, at 71, U.N. Doc. A/810 (Dec. 10, 1948).

among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

This is not the language of law-making.[15]

Thus, the Ninth Circuit erred in finding that the Universal Declaration, "although not binding on states, constitutes 'a powerful and authoritative statement of the customary international law of human rights,'" 331 F.3d at 618, Pet. 22a, n.12 (quoting *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992)), and that the Declaration is "perhaps the most well-recognized explication of international human rights norms." 331 F.3d at 620–21, Pet. 25a.

Much the same is true generally of UN General Assembly Declarations, contrary to the Ninth Circuit's suggestion. 331 F.3d at 617, Pet. 20a ("Evidence of the law of nations may also be garnered from * * * United Nations declarations."). The General Assembly is not a law-making body. While principles it announces in declarations may become norms of customary international law, their presence in a declaration neither makes them so nor is evidence that they have yet achieved the status of international law. *Flores*, 343 F.3d at 165–68.

It must also be clear that the norm applies to private individuals. Even bodies that can make international law—such as groups of nations ratifying multinational conventions—

[15] Moreover, as the Universal Declaration neared its final vote in the UN General Assembly, Eleanor Roosevelt, Chairman of the Commission on Human Rights and a member of the U.S. delegation, stated:

> "In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations." As quoted in 1 Marjorie M. Whiteman, Digest of International Law 53 (1963).

choose in many instances to impose obligations only on States or State actors and not on private individuals.[16]

And even when multinational human rights conventions do not specify the parties to which obligations apply, it may be clear in context that it is official, not private action, that is being addressed. For example, while Article 6 of the ICCPR states: "Every human being has the inherent right to life," and "No one shall be arbitrarily deprived of his life," it would clearly be taking those provisions entirely out of context to read them as making acts by private citizens a violation of the Covenant.[17]

In this connection, we note that the Ninth Circuit did not address the "declaration" accompanying U.S. ratification of

[16] See, *e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (opened for signature Dec. 10, 1984, entered into force June 26, 1987, entered into force for the U.S. Nov. 20, 1994) (ratified by the U.S. with two reservations, five understandings, two declarations, and one proviso, 136 Cong. Rec. 36192–99 (1990)) ("torture" not defined to reach purely private conduct).

[17] This case does not present the question whether the norms of international law at issue here are enforceable against corporations as opposed to natural persons. There is considerable support for the view that customary international law does not routinely impose obligations on corporations. For example, the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (adopted July 17, 1998, entered into force July 1, 2002, not ratified by the U.S.), available at http://www.un.org/law/icc/statute/99_corr/cstatute.htm, restricts its scope to "natural persons." Art. 25. There was lengthy debate among the nations participating in the Rome Conference concerning the inclusion of corporations within the jurisdiction of the International Criminal Court. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf. 183/2/Add. 1 (1998); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf. 183/13 (Vol. II) (1998); Andrew Clapham, "The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court," *in* Liability of Multinational Corporations Under International Criminal Law 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

the ICCPR that the Convention is not "self-executing." 132 Cong. Rec. 8071. *Amicus* supports the position of the United States on this issue: a non-self-executing declaration means that courts cannot enforce a treaty provision absent specific congressional action incorporating the norm, because such a declaration represents a decision by the United States treaty-makers that the treaty provisions should not impose obligations enforceable in private court actions. See, *e.g.*, *Flores*, 343 F.3d at 164 n.35 (finding that the ICCPR, as a non-self-executing treaty, "*does not create a private cause of action in United States courts*"). Such a convention may bind the United States, but it does not make private individuals subject to such obligations.

Similarly, in determining whether particular conduct violates a rule of international law, it is irrelevant that such conduct may be widely prohibited by national law. The Ninth Circuit erroneously found it relevant to the issue whether arbitrary arrest violates international law that such a prohibition "is reflected in at least 119 national constitutions." 331 F.3d at 620, Pet. 25a. But as the Second Circuit has recently found:

> "Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law. As we explained in *Filartiga* [v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980),] and in *ITT* v. *Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975):
>
> > [T]he mere fact that every nation's municipal [*i.e.*, domestic] law may prohibit theft does not incorporate "the Eighth Commandment, 'Thou Shalt not steal' . . . [into] the law of nations." It is only where the nations of the world have demonstrated that *the wrong is of mutual, and not merely several, concern, by means of express international accords*, that a wrong generally recognized becomes an international law violation within the meaning of the statute.

> "* * * Therefore, for example, murder of one private party by another, universally proscribed by the domestic law of all countries (subject to varying definitions), is not actionable under the ATCA as a violation of customary international law because the 'nations of the world' have not demonstrated that this wrong is 'of mutual, and not merely several, concern.'" *Flores*, 343 F.3d at 155 (internal citations omitted).[18]

In sum, not every principle found in sources of international law is intended to be obligatory, as opposed to aspirational, or has matured to the point of being obligatory. And even if obligatory for States, a particular norm may not impose obligations upon private individuals.

C. A Norm of Customary International Law Must Be Specific To Be Enforceable in United States Courts.

As the Fifth and Second Circuits have rightly observed, customary international law cannot be established by statements of "abstract rights and liberties devoid of articulable or discernable standards and regulations." *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999); *Flores*, 343 F.3d at 161 (same). Many principles in international in-

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[18] Similarly, it is immaterial that a norm is an accepted part of U.S. law. The Second Circuit, in a case preceding *Flores*, ruled that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act." *Kadic* v. *Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995). While it may be understandable that courts turn for guidance to a large body of domestic law with which they are familiar, the relevant question for purpose of ATS jurisdiction based on violations of customary international law is the extent to which the "color-of-law" jurisprudence of Rev. Stat. § 1979, 42 U.S.C. § 1983 has become universally accepted as obligatory in the international community. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 450 (2001) ("American principles of state action, which were developed in U.S. civil rights law and have proved critical in corporate ATCA cases, cannot simply be transferred to the international arena.").

struments are deliberately vague to ensure the widest possible acceptance in the international community. See *Flores*, 343 F.3d at 161 (referring to certain norms in the Universal Declaration of Human Rights, in the International Covenant on Economic, Social and Cultural Rights,[19] and in the Rio Declaration on Environment and Development[20] as "boundless and indeterminate" and as "express[ing] virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them"). Such principles, however, should not be deemed to have achieved the status of customary international law.

It is not surprising that the Universal Declaration of Human Rights—an expressly aspirational document, as we have seen—should contain unspecific statements of principle.[21] But the multinational conventions designed to codify those aspirations are often equally vague. For example, Article 6 of the ICCPR states: "Every human being has the inherent right to life. * * * No one shall be arbitrarily deprived of his life." And Article 12 of the International Covenant on Economic, Social and Cultural Rights requires that the States "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Considering these and other statements of purported international law, the Second Circuit correctly determined that "'the rights to life and health are insufficiently definite to constitute rules of customary international law." *Flores*, 343 F.3d at 160–61.

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[19] 993 U.N.T.S. 3 (opened for signature Dec. 19, 1966, entered into force Jan. 3, 1976, not ratified by the U.S.).

[20] U.N. Conf. on Environment and Development, Rio de Janeiro, Brazil, June 13, 1992), 31 I.L.M. 874.

[21] *E.g.*, Art. 3 ("Everyone has the right to life, liberty and security of person."); Art. 12 ("No one shall be subjected * * * to attacks upon his honor and reputation."); Art. 22 ("Everyone, as a member of society, has the right to social security * * *."); Art. 25 ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family * * *.").

The specificity requirement is especially important with respect to the issue of secondary liability for alleged official violations of international norms—a theory for attempting to hold multinational corporations liable in numerous ATS cases.[22] This Court has held that civil liability for aiding and abetting cannot be imposed as a matter of judicial inference of supposed congressional intent accompanying a statute that does not expressly provide such liability, for policy reasons related to the underlying statutory violation, or because aiding and liability is criminal under federal law. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Similar principles should constrain secondary liability as a matter of customary international law. This is especially true because some international conventions specifically address secondary liability, showing that the matter deserves the specific attention of a regular law-making body. *E.g.*, Convention on the Prevention and Punishment of the Crime of Genocide,[23] Art. 3 ("The following acts shall be punishable: * * * [¶] (e) Complicity in genocide.").[24]

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[22] See, *e.g.*, *Doe I* v. *Unocal Corp.*, Nos. 00-56603 *et al.*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *vacated pending rehearing en banc*, 2003 WL 359787 (9th Cir. Feb. 14, 2003); *Sarei* v. *Rio Tinto, plc*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *appeal docketed*, Nos. 02-56256 & 02-56390 (9th Cir. July 26, 2003, Aug. 15, 2003); *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 317 (S.D.N.Y. 2003); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002).

[23] S. Exec. Doc. O, 81st Cong., 1st Sess. (1949), 78 U.N.T.S. 277 (opened for signature Dec. 9, 1948, entered into force Jan. 12, 1951, entered into force for the U.S. Feb. 23, 1989, ratified by the U.S. with two reservations, five understandings, and one declaration, 132 Cong. Rec. 2349–50 (1986)). See also 18 U.S.C. §§ 1091–1093, enacted by the Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988).

[24] See also Article 25.3(c) of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (adopted July 17, 1998, entered into force July 1, 2002, not ratified by the U.S.), available at http://www.un.org/law/icc/statute/99_corr/cstatute.htm (individual criminal responsibility for certain facilitating, aiding, and abetting). The Ninth Cir-

Amicus recognizes that vaguely stated norms have sometimes been found to be appropriate for court enforcement. For example, the Constitution may contain its own "magnificent generalities,"[25] such as the Due Process Clauses and the Equal Protection Clause, which courts have enforced in this country for years. But the Constitution is expressly made "the Supreme Law of the Land," as are "treaties of the United States" (although court enforcement may not be appropriate if they are not "self-executing"). Customary international law, by contrast, has no such constitutional status, and by its nature is not incorporated in a self-executing treaty ratified by the United States. Multinational conventions that the United States has declined to ratify also lack such status. In considering whether to apply norms derived from principals in international instruments or practices, requiring reasonable specificity as to private liability ensures that the international community has in fact reached a consensus on that issue.

Multinational corporations are already subject to at least two, and usually more, legal regimes—including the law of

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cuit panel in *Doe I* v. *Unocal Corp.*, *supra*, relied on decisions of special purpose tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda to determine the contours of aiding and abetting liability on the part of a corporation. 2002 WL 31063976, at *12–13. The concurrence forcefully protested looking to "an undeveloped principle of international law promulgated by a recently-constituted ad hoc international tribunal" to find such secondary liability on the part of corporations. *Id.* at *27. The varied status of such liability in United States jurisdictions—federal and state—should make it clear that the United States has not assented to such liability for private individuals as a matter of civil liability for international law violations, even though the United States participated in the establishment of those special-purpose criminal tribunals.

[25] The phrase appears in Walter Murphy, Constitutional Interpretation as Constitutional Creation, the 1999–2000 Harry Eckstein Lecture, *available at* http://hypatia.ss.uci.edu/democ/papers/murphy.htm. See also Ronald Dworkin, Law's Empire 355 (1986) (Equal Protection and Due Process Clauses described as "notoriously abstract").

the country in which they are incorporated and the law of the country in which they operate. They are also well aware that some norms drawn from international law apply to them.[26] But subjecting them to yet another legal regime, characterized by vague norms that provide no reasonable guidance about acceptable conduct, serves only the interests of successful plaintiffs and their lawyers—not the interests of the countries in which multinational corporations operate, not the interest of world in reasonably free trade, and not the interests of the United States, which encourages free trade and investment abroad.

II. Lower Court Rulings That the ATS Creates a Private Cause of Action Have Led Those Courts To Improperly Resolve Many Substantive Issues That Arise in ATS Lawsuits.

As stated in the Introduction, other briefs in this case show that the ATS does not itself create a private cause of action for damages, as its plain language confirms. This brief does not duplicate those arguments. We give here specific examples of the ways in which the assumption that the ATS creates a private cause of action has led to improper resolution of many substantive issues in ATS cases. Those substantive issues can arise in any ATS lawsuit—even if the ATS is only jurisdictional—but they should not be decided on the erroneous assumption that Congress intended to influence their outcome by providing for a private cause of action under the ATS.

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[26] For example, the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note, passed in part to incorporate into US law the international norm prohibiting official torture, imposes liability on corporate officers and employees (as on any other individual) who engage in torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." Section 2(a), 106 Stat. 73. Congress determined the extent to which those norms require specificity for court enforcement. Section 3, 106 Stat. 73.

Choosing U.S. versus foreign law. The Ninth Circuit found that the federal choice-of-law rule coincided with the Restatement (Second) of Conflict of Laws (1971). 331 F.3d at 633, Pet. 48a–49a. In applying that rule to the issue whether to apply United States or Mexican law, the Ninth Circuit did not simply analyze the four factors in Section 145 of the Restatement.[27] It said that it "must also take into account the policy of the United States, as expressed in the ATCA, to provide a remedy for violations of the law of nations." 331 F.3d at 635, Pet. 52a. It then proceeded to rule that "limitations on damages under Mexican law—including the unavailability of punitive damages—*are not consistent with the congressional policy that underlies the ATCA*." *Id.* (emphasis added). If the ATS is merely a jurisdictional statute, however, it contains no congressional policy with respect to punitive damages or, indeed, with respect to any measure of damages.

Statute of limitations. Many courts, including the Ninth Circuit, have decided that the appropriate statute of limitations in ATS cases is the 10-year statute expressly provided in the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note. *E.g.*, *Papa* v. *United States*, 281 F.3d 1004, 1011–13 (9th Cir. 2002); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293, at *61–62 (S.D.N.Y. Feb. 22, 2002).[28] But there is no sound basis for

[27] Section 145(1) of the Restatement provides: "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationships to the occurrence and the parties under the principles stated in § 6." Section 145(2) then lists the following "contacts" that should "be taken into account in applying the principles of § 6 to determine" the state with the "most significant relationship": "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."

[28] It appears that many courts, including the Ninth Circuit, have misinterpreted the significance of the placement of the TVPA in the U.S. Code as a note to 28 U.S.C. § 1350 (the ATS), mistakenly believing or assuming that Congress chose to place the TVPA there. See *Papa* v. *United States*, 281 F.3d at 1012 (in ruling on statute of limitations: "The provisions of the TVPA were added to the ATCA, further indicating the close relationship between the two statutes."); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1180 (N.D. Cal. 2001) (in ruling on statute of limitations: "Congress enacted the [TVPA] as a statutory note to the ATCA."), *aff'd sub nom. Deutsch* v. *Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003); *Aguinda* v. *Texaco, Inc.*, 142 F. Supp. 2d 434, 534 (S.D.N.Y. 2001) (in ruling on *forum non conveniens*, referring to "an amendment to the ATCA, known as the [TVPA]"), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002); *Iwanowa* v. *Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.N.J. 1999) (in ruling on the private right of action issue: "Indeed, the TVPA is codified as a statutory note to the ATCA."). But the Congress that passed the TVPA did not choose to amend the ATS. Nor did Congress place the TVPA as a note to the ATS in the U.S. Code. The Office of the Law Revision Counsel of the House of Representatives chose the location of the TVPA in the Code. That office places statutory provisions as sections or notes to the U.S. Code or in Appendices to enacted titles when Congress has not passed the statutory provision as a section of the U.S. Code or as an amendment to a previously enacted provision of the Code. H.R. Res. No. 988, 93d Cong., § 205(c), enacted, Pub. L. No. 93-554, tit. I, ch. III, 88 Stat. 1777 (1974), *as amended*, 2 U.S.C. § 285b. That office could just as easily have placed the three sections of the TVPA as three new sections of Title 42 of the Code (a title not yet enacted into law) or in the Appendix to Title 28. See, *e.g.*, 18 U.S.C. App. (containing provisions not enacted into law in Code form); 46 U.S.C. App. (same). Having chosen to place the TVPA in Title 28, an enacted title of the Code, the Office had no choice but to put it in a note to what it determined to be a related section. That choice, however, cannot be attributed to Congress.

applying a statute of limitations applicable to an expressly-created—and quite limited—cause of action more generally to all suits that find their way to federal court by way of the ATS, unless those suits state claims under the TVPA. Adoption of the unusually long 10-year statute of limitations found in the TVPA, as opposed to the generally shorter statutes of limitations set by state law in tort cases, exposes defendants to burdensome proceedings long after much evidence has disappeared. Judicial adoption of such a statute of limitations for the ATS exposes the fallacy that the ATS created a cause

of action. Decisions about the applicable statute of limitations should be based on express congressional action addressing suits outside of the context of the TVPA or on the prevailing rule in favor of analogous state statutes of limitations.

Exhaustion of local remedies. It is generally a requirement of international law that local remedies be sought or shown to be unavailable before resort is made to international law. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 422–23 (1964). Reflecting this understanding, the TVPA expressly requires such exhaustion as a condition to a successful TVPA lawsuit. TVPA, § 2(b). Nevertheless, at least one court has rejected the exhaustion-of-remedies doctrine in an ATS suit on the ground that Congress put such a requirement in the TVPA and did not do so in the ATS. *Sarei* v. *Rio Tinto plc*, 221 F. Supp. 2d 1116, 1137, 1139 (C.D. Cal. 2002), *appeal docketed*, Nos. 02-56256 & 02-56390 (9th Cir. July 26, 2003, Aug. 15, 2003).[29] That argument makes some sense on the false assumption that Congress created a cause of action for damages in the ATS. It makes no sense on the correct understanding that, in passing the ATS, Congress was only providing a jurisdictional base and not addressing the terms upon which one might recover damages.

Retroactivity of the TVPA. When respondent's case was previously before the Ninth Circuit, the court ruled that the TVPA was retroactive, relying in substantial part on its view that the TVPA "does not impose new duties or liabilities on defendants," because "aliens have had the right to adjudicate torture claims in our federal courts since the passage of the [ATS] in 1789." *Alvarez-Machain* v. *United States*, 107 F.3d 696, 702 (9th Cir. 1996). Whether or not that conclusion would be appropriate if the ATS had created a cause of action, the merits of the issue look very different on the correct view that the ATS did no such thing.

[29] The court in *Sarei* stated: "Congress could, had it wished to do so, have amended the ATCA to impose such a requirement at the time it enacted the TVPA. It did not do so." 221 F. Supp. 2d at 1137. And later, "Nonetheless, the court here must apply the plain language of the ATCA, which does not require such a measure." *Id.* at 1139.

Standing. Several courts have looked to the TVPA to determine whether plaintiff has standing to bring an ATS claim. *E.g.*, *Estate of Cabello* v. *Fernandez-Larios*, 157 F. Supp. 2d 1345, 1355 (S.D. Fla. 2001) ("When a federal statute does not specify key details, such as standing, federal courts generally borrow analogous state law, 'unless its application would defeat the purpose of the federal statute,'" and finding the TVPA to be "'the most analogous federal statute.'") (citations omitted). But the TVPA can be characterized as "the most analogous federal statute" only if both the TVPA and the ATS are cause-of-action statutes.

Color of law. The Second Circuit has ruled that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act." *Kadic* v. *Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995). While it may be understandable that courts turn for guidance to a large body of domestic law with which they are familiar, the reference to "color of law" jurisprudence in this instance relies on a false analogy between one of the oldest and most important examples of an express cause-of-action statute—the venerable civil rights provision found in Rev. Stat. § 1979, 42 U.S.C. § 1983—and a jurisdictional statute such as the ATS.[30]

CONCLUSION

The judgment of the court of appeals should be reversed, and the court of appeals should be directed to reconsider the judgment in the light of this Court's decision on the proper scope of the Alien Tort Statute and the proper approach to

[30] While the TVPA uses the term "color of law" in § 2(a), a congressional decision to adopt the term for torture and extrajudicial killing does not necessarily mean that "color of law" jurisprudence—developed in the context of U.S. constitutional law—is suitable for all of the wide range of international law violations that might be the subject of an ATS suit.

deciding when alleged norms of customary international law are enforceable in United States courts.

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JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL FRATERNAL ORDER OF POLICE, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Washington Legal Foundation ("WLF") is a nonprofit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to issues involving national security, civil-justice reform and federalism and opposes the expansion of federal-court jurisdiction beyond appropriate statutory and constitutional limits. WLF has appeared as *amicus curiae* in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003), and *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir. dec. pending), to discuss its view that an overly expansive interpretation of 28 U.S.C. § 1350 is inconsistent with congressional intent and threatens to undermine American foreign and domestic policy interests. In addition, WLF has published articles regarding the propriety of litigating foreign claims in U.S. courts. *See, e.g.*, Peter J. Nickles *et al.*, *Court Properly Limits Scope of Alien Tort Claims Act*, 18 Wash. Legal Found., Legal Backgrounder 2 (Jan. 17, 2003); Layne E. Kruse, *Alien Attack: Foreign Environmental Claims Invade American Courts*, 12 Wash. Legal Found., Legal Backgrounder 30 (July 25, 1997).

The National Fraternal Order of Police ("FOP") is the nation's largest law enforcement labor organization, with over 310,000 members. Members of FOP have a strong interest in ensuring that they not be subject to damage suits under 28 U.S.C. § 1350 for claimed violations of

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[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

international human rights norms. The Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the Supreme Court on a number of occasions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether and how "customary international law" is to be incorporated into the domestic law of the United States. Respondent, a Mexican citizen, contends that he may pursue federal-law tort claims for kidnapping and arbitrary detention against Petitioner, also a Mexican citizen, because those acts, at least when conducted by or in complicity with government officials, violate currently accepted international human rights norms. Adopting two differing rationales, several lower courts have agreed that claims for violations of international human rights norms may be brought as federal causes of action in federal court. The Ninth Circuit has sustained such claims, in this case and others, on the theory that a singular provision of the Judiciary Act of 1789, which by its terms defines the jurisdiction of the district courts, was actually meant by Congress to create a federal private right of action.[2] The Second Circuit has sustained such claims, most notably in *Filartiga v. Pena-Irala*, 630 F.3d 876 (2d Cir. 1980), on the theory that, even in the absence of congressional authorization, federal courts have the inherent power and duty to fashion a body of rights and remedies that are based on international human rights norms and enforceable by

[2] *Amici* adopt the nomenclature used by the United States and Petitioner and refer herein to this untitled provision of the Judiciary Act of 1789, *see* An Act to establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 76-77 (1789), *codified as amended at* 28 U.S.C. § 1350, as the "Alien Tort Statute."

private parties through tort actions arising under "the common law of the United States."

This Court should reject the reasoning of the Second and Ninth Circuits and reverse the decision below for at least four reasons.

First, contrary to the ruling of the Ninth Circuit, the Alien Tort Statute is plainly a mere jurisdictional statute that creates neither substantive federal rights nor a private right of action. *See infra* Part I.

Second, even if the Alien Tort Statute did create a cause of action, the human rights norms invoked by Petitioner here, like those invoked in the vast majority of cases brought under the Alien Tort Statute, are not a part of the "law of nations" as that term is used in the statute and in the Constitution's grant to Congress of the power to define and punish offenses in violation of the law of nations. To the contrary, the body of law referred to as the "law of nations" in the late-eighteenth century applied solely to interstate relations and therefore did not encompass wrongs perpetrated on private citizens by their own governments and countrymen. *See infra* Part II.

Third, contrary to the Second Circuit's holding in *Filartiga*, there is not a self-executing "common law of the United States" pursuant to which the federal courts may create and enforce private rights of action for torts alleged to violate the norms of customary international law. As this Court has repeatedly recognized throughout its history, such transitory common-law torts are, and always have been, questions of local, not federal, law. The Second Circuit's holding to the contrary was premised on that court's misreading of several nineteenth-century Supreme Court cases applying "federal general common law" in a manner that was famously repudiated by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *See infra* Part III.

Fourth, the acceptance by this Court of a judicially enforceable body of international human rights norms would dramatically alter the balance of authority both between the state and federal governments and between the courts and the political branches. In particular, because nothing in the Alien Tort Statute or in the theories set forth by Respondent and the lower courts limits the applicability of international law to foreign actors or foreign conduct, a decision by this Court endorsing one of those theories will necessarily permit future plaintiffs to challenge the practices and policies of the United States, the several States and their respective officers and agents as violative of the norms of customary international law. Because such norms are both more expansive and more indeterminate than the limits on state action set forth in the United States Constitution, the potential for federal-court interference with the prerogatives of the States and the political branches, should the decision below be affirmed, is substantial. *See infra* Part IV.

ARGUMENT

Since the Second Circuit's decision in *Filartiga*, the federal courts, acting in the manner of common-law courts, have been developing an entire body of federal tort law relating to human rights abuses, fleshing out the scope of the federal rights purporting to arise under such law and setting forth a variety of rules relating to ancillary matters such as secondary liability and limitations of actions. *See, e.g., Doe v. Unocal Corp.*, No. 00-56603, 2002 WL 31063976 (9th Cir. Sept. 18, 2002) (vacated pending rehearing en banc); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). These courts have applied this new federal law to a wide variety of alleged human rights abuses occurring all over the world in cases having no connection at all to the United States. *See, e.g., Kadic*, 70 F.3d at 236-37 (rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military during Bosnian civil war); *Doe*, 2002 WL 31063976, at *3-*4 (slavery, rape, murder and

torture in connection with Burmese pipeline project); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2002) (imprisonment, torture and murder of political opponents by Nigerian military); *cf.* Elizabeth Amon, *Coming to America: The Alien Tort Claims Act Provides a Legal Forum for the World*, Nat'l L.J., Oct. 23, 2000, at A1, A10 (describing additional cases). In adjudicating these claims of kidnapping, rape, torture, arbitrary detention and other human rights abuses, the lower courts have purported to apply norms derived from "customary international law."

"Customary international law" refers to an unwritten body of norms that "results from a general and consistent practice of states followed by them from a sense of legal obligation." *Restatement (Third) Foreign Relations Law of the United States* § 102(2) (1987). Traditionally viewed as a tool for the resolution of disputes between nations, *see infra* Part II, international law came to be seen in the wake of the Holocaust as including norms designed to protect individual human rights, *i.e.*, the "freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives." *Id.* § 701, cmt. a. As a body of principles derived from a multitude of sources, including the works of domestic and foreign jurists and commentators, international conventions, decisions of national and transnational tribunals, and the practice of nations, *see Filartiga*, 630 F.2d at 880-81, "customary international law" is not law in the positivist sense. *See generally* Anthony J. Sebok, *Misunderstanding Positivism*, 93 Mich. L. Rev. 2054, 2064-65 (1995) (describing thesis of classical positivism that "every valid legal norm was promulgated by the legal system's sovereign, and the norm's authority can be traced to that sovereign"). But it may obtain the status of positive law, in this nation or others, via what one scholar has called "legal internalization," *i.e.*, the process by which "international norm[s] [are] incorporated into the domestic legal system through executive action, legislative action,

judicial interpretation, or some combination of the three." Harold H. Koh, *How Is International Human Rights Law Enforced?*, 74 Ind. L.J. 1397, 1413 (1999).

In the United States, norms of customary international law cannot have the force of federal law unless and until they are "internalized" by a treaty made by the President with the advice and consent of the Senate, *see* U.S. Const. art. II, § 2, cl. 2, by a statute enacted pursuant to Congress's power to "define and punish . . . Offences against the Law of Nations," *see id.* art. I, § 8, cl. 10,[3] or by a judicial decision. This case presents no question relating to treaties and, although the Alien Tort Statute is an act of Congress, the contention that the statute defines substantive rights does not withstand scrutiny, *see infra* Part I. Rather, this case is about the assumption by some lower courts of the power to incorporate, through judicial fiat, preferred international human rights norms into federal law. This purported power is without legal or historical foundation, *see infra* Parts II-III, and threatens seriously to undermine the appropriate balance of power between the States and the federal government and between the judiciary and the political branches, *see infra* Part IV. It should categorically and definitively be rejected by this Court.

I. THE ALIEN TORT STATUTE IS A PURE JURISDICTIONAL STATUTE THAT DOES NOT CREATE A PRIVATE RIGHT OF ACTION

Petitioner's brief persuasively explains how the text and historical context of the Alien Tort Statute conclusively demonstrate that 28 U.S.C. § 1350 is a jurisdictional statute

[3] An example of Congress's exercise of its Define and Punish Clause power is the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note (1994).

that does not create any substantive federal law, let alone a private right of action. That conclusion is buttressed by this Court's numerous statements and holdings on the differences between jurisdictional statutes and statutes creating substantive rights.

"[J]urisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) (internal quotation marks omitted). Therefore, "pure jurisdictional statutes," such as the Alien Tort Statute, "which seek to do nothing more than grant jurisdiction over a particular class of cases cannot support Art. III 'arising under' jurisdiction" because they do not create substantive federal law. *Mesa v. California*, 489 U.S. 121, 136 (1989) (internal quotation marks omitted). Indeed, as this Court has observed, "it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States" an exercise of Congress's Article I powers to create substantive rights and liabilities. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 452 (1851); *see also Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951) ("The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions.").

This Court has therefore repeatedly and consistently refused to find substantive federal law lurking in the confines of similarly phrased jurisdictional statutes. For example, in rejecting a claim that an admiralty jurisdiction statute, Act of Feb. 26, 1845, ch. 20, 5 Stat. 726, *codified as amended at* 28 U.S.C. § 1873 (2000), represented the congressional creation of substantive federal law pursuant to the Commerce Clause, this Court explained:

> The law . . . contains no regulations of commerce . . . . It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. . . . It is evident . . . that Congress, in passing [the law], did not intend to exercise their power to regulate commerce. . . . [T]he jurisdiction to administer the existing laws upon these subjects is certainly not a regulation within the meaning of the Constitution.

The Propeller Genesee Chief, 53 U.S. (12 How.) at 451-52.

Similarly, this Court has rejected the argument that substantive federal law is created by § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, which provides (in language paralleling that of the Alien Tort Statute) that "[t]he district courts of the United States . . . shall have exclusive jurisdiction of violations of" the federal securities laws. The Court stated:

> Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the [law] which they seek to enforce, not in the jurisdictional provision.

Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979).

And this Court has held that the similarly worded Tucker Act, 28 U.S.C. § 1491(a)(1), which gives the Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States" is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Rather, the Tucker Act merely "confers jurisdiction upon [the Court of Claims] whenever the substantive right exists." *Id.*

So, too, the Alien Tort Statute grants jurisdiction, but does not create substantive federal law. Respondent therefore has no causes of action under the Alien Tort Statute for kidnapping, arbitrary detention or any other tort.

II. THE ALIEN TORT STATUTE DOES NOT APPLY TO THE MODERN CONCEPTION OF INTERNATIONAL HUMAN RIGHTS LAW

Even if the Alien Tort Statute somehow did create or authorize the creation of substantive federal law relating to "the law of nations," such law would not extend to the international human rights norms invoked here or in most of the cases, *see supra* pp. 4-5, brought under the Alien Tort Statute.

To determine whether a particular claim falls within the Alien Tort Statute, the Court must first determine the meaning that the statutory phrase "law of nations" had when the statute was enacted in 1789. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980) (in construing the meaning of a statutory term, Court "look[s] to the contemporaneous understanding of the term"); *Gilbert v. United States*, 370 U.S. 650, 655 (1962) ("[I]n the absence of anything to the contrary it is fair to assume that Congress use[s a] word in [a] statute in its common-law sense."). Unlike the modern conception of international law, which seeks to protect private individuals from human rights abuses at the hands of their own governments and countrymen, *see supra* p. 5, the body of law referred to as "the law of nations" in the late-eighteenth century applied solely to interstate relations. As explained by Emmerich de Vattel, a natural law theorist with significant influence on the Founding generation, *see U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978), "[t]he Law of Nations is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights." Emmerich de Vattel, *The Law of Nations* § 3 (Joseph Chitty

ed. & trans., Phila., T. & J.W. Johnson & Co. new ed. 1853) (1758); *see also* 1 James Kent, *Commentaries* *1 (defining the law of nations as "that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other"); Justice James Iredell, Charge to the Grand Jury for the District of South Carolina (May 12, 1794), *reprinted in Gazette of the United States* (Philadelphia), June 12, 1794 (describing the law of nations as the means "by which alone all controversies between nation and nation can be determined"), *quoted in* Douglas J. Sylvester, *International Law As Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. Int'l L. & Pol. 1, 58 (1999). *See generally* Michael T. Morley, Note, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 Yale L.J. 109, 122-31 (2002) (discussing similar views of other influential Founding-era scholars and writers).

This is not to say that individuals could never have rights and obligations under the law of nations. Eighteenth-century courts applied the law of nations (as general common law, *see infra* Part III) to matters where the conduct of private citizens touched upon relations between nations, such as where one nation's citizens or residents injured or affronted the dignity of another nation or its officers or citizens. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813-14 (D.C. Cir. 1984) (Bork, J., concurring); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 475-80 (1989); John M. Rogers, *The Alien Tort Statute and How Individuals 'Violate' International Law*, 21 Vand. J. Transnat'l L. 47, 49-50 (1988). Blackstone provided examples of such matters, noting that "[t]he principal offences against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and, 3. Piracy." 4 William Blackstone, *Commentaries* *68. Another area in which the law of nations regulated the conduct of private individuals was the field of prize,

whereby warring nations (and their citizens) captured enemy merchant vessels. *See* Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445, 451-67 (1995). Significantly, however, because the rights and duties of individuals under international law stemmed from obligations between nations, violations of the law of nations could not arise out human rights abuses perpetrated against an individual by his own government or countrymen within his own country.

The United States' treatment of these issues prior to and just after the adoption of the Constitution is consistent with this understanding of the law of nations. In 1781, for example, the Continental Congress, itself lacking the necessary regulatory authority, passed a resolution recommending that the States enact laws to punish "infractions of the laws of nations." 21 *Journals of the Continental Congress 1774—1789*, at 1136 (Gov't Printing Office 1912). The resolution singled out, as the "most obvious" subjects of such legislation, violations of safe-conducts and passports granted by Congress to foreign subjects in times of war, acts of hostility against those in amity with the United States, infractions of the immunities of ambassadors and other public ministers, and treaty violations. *Id.* at 1136-37. The resolution also recommended that the States create civil remedies for "injur[ies] done to a foreign power by a citizen." *Id.* at 1137. A decade later, the newly empowered First Congress was able to rely on the Define and Punish Clause, *see supra* p. 6 & note 3, to criminalize violations of safe-conducts and passports and affronts to and assaults on ambassadors and other public ministers. *See* An Act for the Punishment of

certain Crimes against the United States, ch. IX, §§ 25-28, 1 Stat. 112, 117-18 (1790).[4]

This general understanding that international law did not govern a nation's domestic affairs continued, moreover, well into the twentieth century. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422 (1964) (describing the "peculiar nation-to-nation character" of international law and noting that "[t]he traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another"); *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941) (explaining that principles of international law "are concerned with international rights and duties and not with domestic rights and duties"); *cf. Sabbatino*, 376 U.S. at 423 ("the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders").

It is clear, therefore, that when Congress enacted the Alien Tort Statute in 1789, the statutory phrase "tort only committed in violation of the law of nations" was understood to extend only to torts touching upon the United States' relations with other nations (such as a violation of a safe-conduct or an assault, by a U.S. citizen or occurring in the

[4] Historians have pointed to the Marbois Affair of 1784, in which Counsel General Marbois, a French diplomat, was assaulted in Philadelphia, as illustrative of the concerns underlying the decision to vest the federal courts with jurisdiction over civil actions involving violations of the law of nations. *See* Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. Int'l L. & Politics 1001, 1008-09 & n.29 (2001). The inability of the national government directly to address the Marbois incident, and others like it, prompted the enactment of both the Constitution's grant of federal-court jurisdiction over "Cases affecting Ambassadors [and] other public Ministers and Consuls," U.S. Const. art. III, § 2, and its statutory complement, the Alien Tort Statute. *See* Short, *supra*, at 1009.

United States, on a foreign diplomat). It did *not*, however, apply to human rights abuses perpetrated against individuals by their own governments or countrymen within their own nations. Even if it were more than a pure jurisdictional statue, therefore, the Alien Tort Statute would not reach the conduct alleged here and in the typical modern lawsuit brought under the statute.

III. FEDERAL COMMON LAW DOES NOT BY ITS OWN FORCE GIVE RISE TO A FEDERAL TORT CLAIM FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW

Even *Filartiga*, the progenitor of alien-tort litigation, recognized that the Alien Tort Statute was a pure jurisdictional statute that did not create a cause of action. *See Filartiga*, 630 F.2d at 887 (noting that the Alien Tort Statute does "not . . . grant[] new rights to aliens" but provides jurisdiction over "rights already recognized"). In holding that the plaintiff in that case had nevertheless raised a federal claim, the Second Circuit concluded that claims for violations of international human rights norms — even where those norms had not been codified into a domestic enactment such as a federal statute or treaty — existed as part of "the common law of the United States." 630 F.2d at 885-87. The Alien Tort Statute, in the Second Circuit's view, was simply a jurisdictional conduit pursuant to which such pre-existing claims could be brought in federal court. *See id.*[5]

[5] The Second Circuit has yet to address the logical consequence of its conclusion: if claimed violations of international human rights law really do arise under "the common law of the United States," then reliance on the Alien Tort Statute for jurisdiction over such claims is redundant now that Congress has granted the federal courts general federal-question jurisdiction, *see* 28 U.S.C. § 1331.

Contrary to *Filartiga*, however, this Court has held, on numerous occasions, that a claimed violation of an international-law norm that has not been codified in a federal treaty or statute does not present a federal question or arise under federal law. *New York Life Insurance Co. v. Hendren*, 92 U.S. 286 (1875), is instructive. There, a Virginia widow had sued a New York insurance company in state court to recover the proceeds of a life insurance policy. One of the issues in the state-court proceeding was the effect, under "the general laws of war, as recognized by the law of nations applicable to th[e] case," of the Civil War upon the life insurance contract. *Id.* at 286. This Court dismissed the writ of error for want of federal-question jurisdiction,[6] explaining that the appeal, although arising under the law of nations, "present[ed] questions of general law alone" and therefore did not "show that any Federal question was decided or necessarily involved in the judgment rendered by the court below." *Id.*

This Court reiterated its holding that claimed violations of uncodified international law do not present a federal question in *Ker v. Illinois*, 119 U.S. 436 (1886), a case involving facts similar to those at issue here. In *Ker*, an individual acting as an agent of the United States government traveled to Peru, where, without the authorization of the Peruvian government, he kidnapped, detained and forcibly transferred a fugitive to Illinois to stand trial. *Id.* at 438, 442-43. The state court rejected defendant's argument that the kidnapping and detention required dismissal of the indictment, and the

[6] At the time, this Court's appellate jurisdiction over decisions of state courts was defined by § 25 of the Judiciary Act of 1789 and limited to federal questions. *See* An Act to establish the Judicial Courts of the United States, ch. 20, § 25, 1 Stat. 73, 85-87 (1789) (as amended); 16B Charles A. Wright *et al.*, *Federal Practice and Procedure: Jurisdiction* § 4006 & nn.1-3 (1996).

defendant sought a writ error from this Court. *Id.* at 438-39. After rejecting on the merits arguments that the forcible abduction violated the Fourteenth Amendment and a treaty between the United States and Peru, this Court held that it otherwise could not review the defendant's claim that his forcible extradition from a foreign jurisdiction barred his trial. *Id.* at 444. This was so, the Court explained, because the question was "a question of common law, or of the law of nations," that was "within the province of the State court" and that this Court therefore had "no right to review." *Id.*

Even foreign sovereign immunity, a quintessential part of the law of nations, raised a non-federal question before that doctrine was codified as federal law by the political branches. *See, e.g.*, *Transportes Maritimos do Estado v. Almeida*, 265 U.S. 104, 105 (1924) (holding that a "claim of [foreign] sovereign immunity does not present a question of federal jurisdiction"); *Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442-43 (1924) (explaining that "[t]he question of sovereign immunity is such a question of general law, applicable as fully to suits in the state courts as to those prosecuted in the courts of the United States" and holding that the Court therefore lacked federal-question jurisdiction to review the writ of error); *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 266 U.S. 580 (1924) (per curiam) (dismissing appeal raising issue of foreign sovereign immunity "for the want of jurisdiction"). Indeed, the view that international law generally did not raise issues of federal law prevailed well into the twentieth century. *See, e.g.*, *Bergman v. De Sieyes*, 170 F.2d 360, 361 (2d Cir. 1948) (L. Hand, C.J.) ("although the courts of [New York] look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves").

Moreover, these judicial decisions were in accord with the formal opinion of Attorney General Levi Lincoln, expressed

shortly after the passage of the Alien Tort Statute. Writing to the Secretary of State about an assault by U.S. citizens on a Spanish minister, the Attorney General observed that the act was "an aggravated violation of the law of nations," but that there was no federal remedy given the absence of a congressional "statute recognizing the offence." 5 Op. Att'y Gen. 691, 692 (1802). This was so, the Attorney General explained, because "[t]he law of nations is considered as a part of the municipal law of each State." *Id.*

In short, the historical record is quite clear: from the Founding until the decision in *Filartiga*, claimed violations of international law were treated just as any other transitory common-law tort claims: as non-federal claims that could only be litigated in federal court if jurisdiction was otherwise proper. That *Filartiga* represented a sharp break from this historical understanding is highlighted by a comparison of the reasoning of *Filartiga* with the dissenting opinion in *New York Life*, where Justice Bradley was alone among the Justices in contending — just as the Second Circuit would assert more than 100 years later — that claims based on "unwritten international law" arose under the "laws of the United States." 92 U.S. at 288 (Bradley, J., dissenting).

In reaching its conclusion, the Second Circuit, which failed to cite any of these authorities, made the crucial analytical mistake of taking out of context statements by this Court that international law is "part of our law" and "part of the law of the land." 630 F.2d at 887 (quoting *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815), and *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Respondent echoed this language in his opposition to the *certiorari* petition, arguing that substantive rights under the law of nations "already existed in American law by virtue of the incorporation of the law of nations into the common law of the United States"; that "torts in violation of the law of nations would be cognizable at common law, just as any other tort would be"; and that "this Court approved the application of customary

international law in U.S. courts even in the absence of positive Congressional enactment." Resp. Cert. Opp. at 13-15 & n.8 (citing, *inter alia*, *The Nereide* and *The Paquete Habana*).

When viewed in their proper context, however, the Court's *dicta* in *The Nereide* and *The Paquete Habana*, are fully consistent with the authorities discussed above. These cases — both of which were before this Court as part of its statutory admiralty jurisdiction, *see The Paquete Habana*, 175 U.S. at 680-85; *The Nereide*, 13 U.S. (9 Cranch) at 388-91 — were decided prior to the seminal decision in *Erie Railroad Co. v. Tompkins*, in which this Court famously pronounced that "[t]here is no federal general common law." 304 U.S. at 78. Prior to *Erie*, the federal courts applied their own independent rules of decision to transitory common-law claims. *See, e.g., Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1517-27 (1984) (describing the Founding era view of the "general common law"). These federal-court decisions on matters of "general law" did not create or apply federal law. *See Erie*, 304 U.S. at 74-75 (explaining that "general law" was not binding on the States); Fletcher, *supra*, at 1517-18, 1521-25, 1558-62 (explaining the early American understanding of "[t]he general common law" as "nonfederal law"); *cf. Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) ("It is clear, there can be no common law of the United States. . . . There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption."). To a modern eye, however, these pre-*Erie* decisions could be — and to the *Filartiga* court were — misinterpreted as endorsing the view that certain aspects of the common law, such as international law, were federalized. To the contrary, international law was simply a part of this "general common law" and, in that

respect, was no different than the law of contracts and the law of torts: all were "part of our law" and of the "law of the land." *See, e.g.*, *Kurtz v. Moffitt*, 115 U.S. 487, 498 (1885) (describing the common law of England as "part of our law"); *Eidman v. Martinez*, 184 U.S. 578, 591 (1902) ("[w]hen we speak of *our* laws we mean to be understood as referring to our own statutory laws or the common law we inherited from the mother country" (emphasis in original)); 4 William Blackstone, *Commentaries* *67 (explaining that "the law of nations . . . is [in England] adopted in its full extent by the common law, and is held to be a part of the law of the land").[7]

This pre-*Erie* understanding of international law was specifically addressed by this Court in *Huntington v. Attrill*, 146 U.S. 657 (1892). The issue there was whether the Maryland state courts were required to give full faith and credit to a judgment rendered under a New York law, which required a determination whether the New York law was penal in nature. This Court characterized the question as one of "international law" and described the domestic status of such law in a manner reflecting a quintessential example of the pre-*Erie* understanding of the common law:

> In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one

[7] *Filartiga*'s conceptual misstep is criticized in depth in Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997). *See also Al Odah*, 321 F.3d 1147-48 (Randolph, J., concurring); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv. L. Rev. 2260 (1998); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205 (1988).

> of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. . . . If a suit . . . is brought in a court of another State, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court.

Huntington, 146 U.S. at 683 (citing *New York Life*).[8]

Erie, however, expressly disavowed the two major premises on which nineteenth-century jurisprudence was — and *Filartiga* is — based. *First*, this Court rejected the idea that the federal courts can apply law not derived from a sovereign source, noting that "law in the sense in which courts speak of it today does not exist without some definite authority behind it." *Erie*, 304 U.S. at 79 (internal quotation marks omitted). *Second*, the Supreme Court rejected the legal fiction that courts "discover" common law rules, explaining that the common law "is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject" and noting that under the Constitution, the federal courts lack this general common-lawmaking power. *Id.* at 78 (internal quotation marks omitted); *see also Guaranty Trust Co. v. York*, 326 U.S. 99, 101-02 (1945) ("[*Erie*] overruled a particular way of looking at law"); *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a

[8] In *Huntington*, the Court ultimately applied federal law to the question presented, but did so only because that issue was part of an inquiry under the Full Faith and Credit Clause of the Constitution. The Court explained that its decision to apply federal law was "analogous" to the situation where federal law controls the interpretation of contracts in matters arising under the Constitution's Contracts Clause. *Id.* at 684; *see also Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942) ("When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions . . . .").

statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (internal quotation marks omitted)). *Filartiga* rests precisely on both these premises; it refers to a source of law (the norms of customary international law) that has no sovereign authority behind it, and it grants the federal courts common-lawmaking authority to fashion general rules relating to that "law."

In contrast to the "federal general common law" that was repudiated in *Erie*, there is a modern, limited form of federal common law. But this modern federal common law does not support the creation of a body of international human rights tort law. To the contrary, consistent with *Erie*'s pronouncement that federal courts are powerless to apply law not derived from a sovereign source, modern federal common law applies only where necessary to further "a genuinely identifiable (as opposed to judicially constructed) federal policy." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994); *cf. D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (observing that "[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them"). Thus, this Court has held that federal common law will displace non-federal law only where there is both an identifiable "uniquely federal interest" and a "significant conflict" between that interest and the operation of the non-federal law. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988).

There exists no identifiable uniquely federal interest in tort disputes arising out of the mistreatment of foreign citizens by their own governments or by their fellow citizens within their own countries. Even if there were such an interest, moreover, it is difficult to see how it would significantly conflict with, so as to preempt completely, the application of local law to such disputes. *See id.* at 508 (explaining that federal common law applies only to those particular elements of a claim that are in conflict with the

federal interest). Indeed, to the extent there is any identifiable federal policy with respect to individual human rights under international law, it counsels *against* the creation of a private right of action enforceable in federal court, as demonstrated by this Court's holding in *Banco Nacional de Cuba v. Sabbatino*.

In *Sabbatino*, this Court held that modern federal common law requires the application of the act-of-state doctrine as a federal law *defense* against claims challenging the conduct of foreign governments under international law. *Id.* at 421. In doing so, the Supreme Court made clear that the act-of-state doctrine had "'constitutional' underpinnings," and originated not in international law but in constitutional separation of powers principles that counseled against judicial intervention in foreign affairs. *Id.* at 422-24; *see also Restatement (Third) Foreign Relations Law of the United States* § 443 cmt. a & n.1 ("no rule of international law requires application of the act of state doctrine"). Thus, despite some broad dictum in *Sabbatino* concerning the application of modern federal common law to issues of international law, it is clear that this Court did not endorse the federalization of every common-law tort that happened also to be a human rights violation. To the contrary, in holding that the act-of-state doctrine prevented a plaintiff from bringing claims for torts alleged to violate international human rights law, the Court in *Sabbatino* "declared the ascertainment and application of international law beyond the competence of the courts of the United States," 376 U.S. at 439 (White, J., dissenting), and "did not consider international law to be part of the law of the United States in the sense that United States courts must find and apply it as they would have to do if international legal rules had the same status as other forms of United States law," Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 Mich. J. Int'l L. 450, 463 (1989).

IV. THE INCORPORATION OF INTERNATIONAL HUMAN RIGHTS NORMS INTO FEDERAL LAW WOULD SERIOUSLY UNDERMINE DOMESTIC FEDERALISM AND SEPARATION OF POWERS

The briefs of Petitioner, his other *amici* and the United States persuasively explain why affirmance of the decision below would have serious adverse consequences for both the political branches' ability to conduct foreign affairs (including the war on terror) and the ability of U.S. corporations to do business abroad, particularly in remote or unstable areas that require security protection. This Court should not, however, lose sight of the drastic *domestic* implications of its decision in this case.

Although the focus of international human rights litigation to date has been on abuses committed by and in foreign nations, *see supra* pp. 4-5, there is nothing in the doctrines developed by the lower courts that would limit the application of the Alien Tort Statute to such situations. To the contrary, the entire premise of the modern conception of customary international law is that the rules protect individuals from human rights abuses committed by their own governments and countrymen and in their own countries. *See supra* pp. 4-5. Accordingly, any federal right of action to enforce international "law" generally (as opposed to a narrowly drawn congressional enactment such as the TVPA, *see supra* note 3) would necessarily govern the domestic conduct of state and federal officials. In other words, if U.S. law provides a cause of action for human rights abuses committed in *Mexico*, then it necessarily authorizes a cause of action for the same human rights abuses committed in *New Mexico*.[9]

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[9] The class of plaintiffs eligible to bring human-rights claims against domestic officials would vary depending on which of the lower courts' theories were adopted. Under the Ninth Circuit's view that the Alien Tort Statute creates a statutory right of action, that right of action would be limited by the express terms of the statute, which applies only to alien plaintiffs. By contrast, under the Second Circuit's more expansive view that claimed violations of customary international law arise under federal common law, such claims could be brought by any plaintiff pursuant to the general federal-question jurisdictional statute, 28 U.S.C. § 1331. *See supra* note 5. In either event, the adverse domestic consequences discussed herein would be significant.

Under the current legal regime, plaintiffs with grievances against state or federal officials may bring federal claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, or the *Bivens* doctrine. If this Court were to recognize claims for customary international law violations, then in many, if not most, cases involving allegations of civil rights violations or police misconduct, plaintiffs will demand, and the courts will be required to perform, a second layer of review, testing the official action not only against the strictures of the U.S. Constitution and federal law, but also against the prevailing standards of customary international law. Such review — in addition to altering the balance of power between the States and the federal government and between the courts and the political branches — will likely impose a significant burden on both courts and litigants. *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003) ("the relevant evidence customary international law is widely dispersed and generally unfamiliar to lawyers and judges").

In addition to imposing additional restrictions on the conduct of government officials in their law enforcement and other duties, customary international human rights norms, if found to be a part of federal law, could be used as an end run around this Court's decisions limiting the scope of federal authority. For example, the Court has held that the federal government lacks the constitutional authority to authorize federal remedies for local acts of gender-motivated violence.

See United States v. Morrison, 120 S. Ct. 1740 (2000). However, the documents and institutions that are the sources for customary international law suggest that freedom from gender-motivated violence is, or is evolving into, an international human rights norm. *See Brief of Amici Curiae on Behalf of the International Law Scholars and Human Rights Experts in Support of Petitioners, United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1037253 (cataloging such sources). If this is so, then a federal cause of action of the sort invalidated in *Morrison* would nevertheless be viable under federal law. Indeed, a number of commentators have urged just such a result. *See, e.g., id.*; Mary Ann Case, *Reflections on Constitutionalizing Women's Equality*, 90 Calif. L. Rev. 765, 774 n.56 (2002). Similarly, given that various sources of international human-rights norms address freedom of religion, *see* Morley, *supra*, at 116 & nn.40-41 (cataloging such sources), the incorporation of those norms into federal law could require courts to enforce limitations on state action affecting religious activity similar to those that the Court invalidated, as exceeding the scope of Congress's powers, in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

The incorporation of customary international human rights norms into federal law would also inevitably lead to unwarranted federal-court interference with the several States' criminal justice systems, including, for example, the ability of the States to impose punishments such as the death penalty. Under federal law, the outer boundaries of a State's power to impose punishment for criminal activity are delineated by the Eighth Amendment, and may not be further infringed upon by the national government. Yet, if the human-rights norms of the international community are incorporated into U.S. law, then a judicial determination that certain punishments violate those norms would prohibit the States from imposing them, regardless of how widespread their domestic acceptance. Indeed, many international law scholars have argued that the death penalty (or at least

certain applications of it) violates customary international law, *see, e.g.*, Julian S. Nicholls, Comment, *Too Young to Die: International Law and the Imposition of the Juvenile Death Penalty in the United States*, 5 Emory Int'l L. Rev. 617, 651-52 (1991) (arguing that the juvenile death penalty violates federal common law); Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 Duke L.J. 485, 489-90, 514, 533-34 (2002) (collecting arguments that the imposition of the death penalty on persons under the age of eighteen violates customary international law), and challenges to the death penalty based on international human rights norms have already been brought in the federal courts, *see, e.g., Hain v. Gibson*, 287 F.3d 1224, 1242-44 (10th Cir. 2002), *cert. denied*, 537 U.S. 1173 (2003); *Beazley v. Johnson*, 242 F.3d 248, 263-68 (5th Cir. 2001).

These examples are just the tip of the iceberg. Scholars and commentators have argued that international law protects, or may soon protect, rights relating to an incredibly broad range of topics, including, in addition to those discussed above, education, employment, property, environmental protection and sexual orientation. *See* Bradley & Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, *supra*, 110 Harv. L. Rev. at 841 & nn.170-71 (1997) (providing examples of such arguments); Morley, *supra*, at 117 (explaining that "[e]xisting international agreements cover almost every imaginable aspect of society, including marriage, juvenile justice, and education" (footnotes omitted)). A decision endorsing the incorporation of customary international law into federal law thus has the potential to federalize vast expanses of areas that are now within the realms of state self-government.

The use of international human rights norms to regulate local activity is particularly troublesome because of the nature of modern international law. Despite the sources of international law set forth in *Filartiga* and the Restatement,

there is neither an authoritative arbiter of international law nor an objective method for determining the norms incorporated therein, making international human rights law necessarily indeterminate. *See, e.g.*, *Flores*, 343 F.3d at 154 (describing customary international law's "soft, indeterminate character"); Christopher A. Ford, *Adjudicating Jus Cogens*, 13 Wis. Int'l L.J. 145, 165 (1994) ("Apart . . . from the comparatively uncontroversial genocide and slavery prohibitions—which still have their doctrinal critics—nothing approaching a general consensus has developed regarding the substantive content of peremptory international law" (footnote omitted)). International law "evolves," moreover, on the basis of the views of entities, such as domestic and foreign jurists, foreign and transnational courts and treaty-making bodies, that are neither representative of the American political community nor responsive to it. Under these circumstances, the potential for anti-democratic judicial activism in connection with the creation of a federal common law of international law cannot be overstated. As Judge Randolph recently observed in arguing that courts are unauthorized to exercise a "free-wheeling judicial power" to apply international law:

> The political branches of our government may influence but they by no means control the development of customary international law. To have federal courts discover it among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers.

Al Odah, 321 F.3d at 1148 (Randolph, J., concurring); *see also Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring) (arguing that the courts "ought not serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations").

Judicial interpretation is difficult and divisive enough when it is based on the Constitution and the laws enacted by Congress. Were federal courts authorized to pass judgment on official action based on a State's compliance with "international" or foreign norms, fundamental principles of judicial restraint, separation of powers and federalism would be subverted. Whether Congress could even authorize such a regime through an unambiguous statutory pronouncement is itself a serious question going to the heart of our constitutional structure. To permit the courts to authorize it, either based on a once-obscure jurisdictional statute or, even more radically, without any congressional authorization at all, is a step that this Court should firmly reject.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision below and hold that the neither the Alien Tort Statute nor the "common law of the United States" provides a private right of action for violations of international human rights law.

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JOSE FRANCISCO SOSA,
Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PROFESSORS OF INTERNATIONAL LAW, FEDERAL JURISDICTION AND THE FOREIGN RELATIONS LAW OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

This brief *amicus curiae* is respectfully submitted by law professors with expertise in international law, federal jurisdiction, and the foreign relations law of the United States. *Amici* believe that the Ninth Circuit's interpretation of 28 U.S.C. § 1350 in this case, which draws on an earlier innovation of the Second Circuit in *Filartiga v. Peña-Irala*, 630 F.2d 876 (1980), reflects unsound statutory interpretation and impermissibly shifts the lawmaking role from the politically accountable branches to the courts. The principal effect of the unrestrained role for the judiciary advanced by the decision below is to place the United States at a structural disadvantage in its international relations by undermining the government's capacity to ensure the meaning of its commitments under international agreements. As specialists in international law and federal jurisdiction, we are concerned that an affirmance of the ruling below would impose upon the political branches of our country handicaps faced by the governments of no other nation and seriously complicate the ability of the United States to advance the interests of its people in international affairs.

SUMMARY OF ARGUMENT

The Ninth Circuit incorrectly interpreted 28 U.S.C. § 1350 as authorizing federal courts to create means of enforcing international obligations through private civil suits between aliens. Shifting the power to create remedies for supposed violations of international law away from the Executive and Congress and towards the courts undermines the role of state consent in the creation of international law by imposing upon

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[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* made any monetary contribution to its preparation or submission. The written consents of petitioner and respondent Alvarez-Machain to the filing of this brief have been filed with the Clerk. The written consent of respondent United States accompanies this brief.

the United States enforcement obligations that it has not assumed. The political branches should decide whether particular obligations reached in international negotiations will carry with them a private right of action for money damages. The Ninth Circuit's reading will undermine the capacity of the United States to participate in the sound development of international law. Other nations do not recognize a general power on the part of their courts to use private civil suits as a means of enforcing international law. There is no reason to believe that Congress in 1789 created such a power in the judiciary. The long history of disuse of 28 U.S.C. § 1350, from the time of its enactment in 1789 until the Second Circuit's 1980 invocation in *Filartiga*, indicates that the interpretation embraced by the Ninth Circuit is a modern artifact unrelated to the original purpose of Congress in enacting the statute.

ARGUMENT

I. The Ninth Circuit's Interpretation of 28 U.S.C. § 1350 Is Unsound and Imposes Burdens under International Law to Which This Country Has Not Assented.

The fundamental issue in this case is whether 28 U.S.C. § 1350 (hereinafter "§ 1350"), in referring to "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," means to treat as actionable torts all injuries traceable to transgressions of "the law of nations" or any treaty.

The court below ruled that § 1350 both creates federal court jurisdiction to hear all claims based on international law and authorizes the federal courts to develop a federal common law of torts based on international law.

We discuss the question of jurisdiction in Part V below. As to the rule of decision, the operative language of the statute is "a tort only, committed in violation of the law of nations or a treaty of the United States." There is no basis for believing that Congress intended this language to embrace all violations

of international law anywhere. By using these words of limitation, Congress addressed only those instances where international law itself regarded specific conduct as giving rise to a civil action for damages on the part of a person injured by the violation. It is not enough for international law to forbid particular conduct. International law must provide for civil liability for a violation in order for the violation to constitute a tort under § 1350.

A proper understanding of the meaning and purpose of this language in § 1350 requires an appreciation of what international law is and is not. International law in its essence involves obligations that a state has assumed. In the case of treaties, the assumption of the obligation results from the state's consent to the treaty, and the content of the obligation becomes a matter of treaty interpretation. *See, e.g., El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999) (focus on words of treaty and evidence of the understanding of parties); *Air France v. Saks*, 470 U.S. 392, 399 (1985) (same). As with a private contract, a treaty will not be understood to impose on parties duties that they did not intend to assume.

There is considerable disagreement as to what kind of law customary international law is, and in particular whether it constitutes federal law within the meaning of Article III of the Constitution.[2] There is no debate, however, about the core

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[2] The academic literature debating the status of customary international law as federal law is vast and contentious. For the early stages of this debate, compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), and Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 110 HARV. L. REV. 2260 (1998), Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L REV. 665 (1986), and A. Mark Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995), with RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111 comment d, 115 comment e (1987), and Harold H. Koh, *Is International Law Really State Law?* 111 HARV. L. REV. 1824 (1998). Of course, if customary interna-

principle that a rule of customary international law exists if, and only if, states regard that norm as creating a binding legal obligation. A state which has rejected the binding character of a purported norm of customary international law is not bound by that norm.[3]

In determining the obligations that bind a state under international law, whether through a treaty or as a matter of customary international law, one must distinguish between the primary rule of conduct—whether a promise to disarm, to adopt a rule of international commercial law, or to respect core human rights—and the remedial mechanisms for enforcing that rule, including the choice of persons against whom an obligation may be enforced. A state may accept a particular obligation while imposing strict limits on the ways that obligation can be enforced against it or its subjects. In sum, a state is bound under international law only to the extent it has assented both to an obligation and to the means of enforcing that obligation.

This Court's jurisprudence recognizes that the existence of an obligation under international law does not imply a license for the judiciary to create methods to enforce the obligation. For example, in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), the Court confronted an air carrier's violation of an obligation to provide adequate notice of the limits to the carrier's liability resulting from the Warsaw Convention. The Court noted that whatever the precise obligation of the carrier to notify passengers of the liability limits, the Warsaw Convention did not impose suspension of the limits as a sanction. The Court recognized, in other words, that both the duty and the consequences for its violations had to be

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tional law is not federal law, then a suit brought by an alien against another alien, not based on admiralty, would not vel non come within federal court jurisdiction.

[3] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment d (ALI 1987).

determined by reference to the international instrument in question, and not based on a free-standing mandate for judges to create whatever enforcement mechanisms they might wish.

The decision of the court below, as did the earlier ruling of the Second Circuit in *Filartiga v. Peña-Irala*, 630 F.2d 876 (1980), flouts this fundamental principle of international law. It leaps from a determination that a norm of customary international law exists to an assertion that a transgression of that norm must result in a right to a civil action against an individual under § 1350. This move is unwarranted and unsound.

The court below conceded, as it must, that no international agreement to which the United States (or, for that matter, any other state) is a party creates a personal right not to be subjected to what it characterized as a transborder abduction.[4] Instead, the court divined the existence of an individual right under customary international law to be free from "arbitrary arrest and detention." It further determined that a violation of this supposed right occurred when a state allegedly carried out an arrest on the territory of another state without the permission or consent of the latter state or express authorization under its own law. *Alvarez-Machain v. United States*, 331 F.3d 604, 623 & n.23 (9th Cir. 2003). It then concluded that § 1350 required a court to regard transgression of this freshly minted right as "a tort . . . committed in violation of the law of nations" and therefore actionable in federal court. *Id.* at 631.

In concentrating on the question whether international custom provided general support for the proposition that individuals may not be subjected to arbitrary arrest and

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[4] Indeed, a treaty signed by the United States and Mexico, which has not yet gone into force, would expressly prohibit suits for such abductions. Treaty to Prohibit Transborder Abductions, Nov. 23, 1994, U.S.-Mex., *reprinted in* Michael Abbell, *Extradition to and From the United States*, at A-303 (2002) (cited in *Alvarez-Machain v. United States*, 331 F.3d 604, 619 (9th Cir. 2003).

detention, the court ignored the question of what consequences international law attached to violations and therefore what constitutes "a tort . . . committed in violation of the law of nations." The evidence cited by the court for the existence of this supposed custom cum law included the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature*, Nov. 4, 1950, 213 U.N.T.S. 222, and the African Charter on Human and Peoples' Rights, *opened for signature*, June 27, 1981, 1520 U.N.T.S. 217, instruments to which the United States is manifestly not a party and which in no case provide for a right to a civil action for damages in domestic courts, and the American Convention on Human Rights, *opened for signature*, Nov. 22, 1969, 1144 U.N.T.S. 123, an instrument that the United States has not ratified and which also does not provide for domestic judicial enforcement. 331 F.3d at 621 n.17. The court below also relied on the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; for the United States, Sept. 8, 1992), an instrument which the United States in ratifying explicitly stated does not create any judicially enforceable remedies under U.S. law. U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992); REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Exec. Rep. 102-23, at 10 (1992). None of the authorities cited by the court below suggests the existence under international law of a right to sue for damages for arbitrary arrest and detention. Further, the international instruments cited by that court purport to create rights against governments only, not against individual government agents.[5]

[5] The United States, of course, has remarkably strong legal protections against arbitrary arrest and detention, based principally on the Fourth and Fourteenth Amendments. *See, e.g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). These protections, however, do not extend to the actions of foreign actors such as petitioner Sosa. The Ninth Circuit in effect interpreted the international obligations of the United States as comprising the creation of a *Bivens* claim on behalf of all persons, including nonresident aliens, against all governmental actors worldwide. No international treaty, however, creates such an obligation.

The holding of the court below produces a result clearly at odds with the obligations that the United States has assumed. First, by defining an "arbitrary arrest and detention" as comprising all instances where the United States carries out an arrest outside of U.S. territory without the cooperation and consent of local authorities (absent express domestic authority to effect extraterritorial arrests), it in effect creates an individual right not to be subjected to transborder abduction. This result flies in the face of the Ninth Circuit's correct determination that no such U.S. obligation exists. Second, the holding of the court below would appear to make a nullity of the provision of the impending U.S.-Mexican treaty that forbids lawsuits based on abductions. *See* note 4 *supra*. Third, it reverses the determination of the U.S. Senate that the International Covenant on Civil and Political Rights should not have direct effect in U.S. law by authorizing a damages action for violation of that treaty. Fourth, it brings into effect the American Convention on Human Rights without any Senate consent at all. In essence, the Ninth Circuit seeks to impose on the United States, in the guise of "finding" customary international law, an obligation which the politi cal branches of our government have manifestly refused to assume.

A proper reading of § 1350 avoids each of these obviously problematic outcomes. It would not regard § 1350 as an open invitation to develop a law of sanctions for any behavior that might be regarded as violating some aspect of international law. To the contrary, that statute applies only to particular international-law obligations, namely those recognized under

international law as giving rise to a civil action in tort for compensation. It does not give federal courts the authority to treat as torts all violations of international law involving aliens, but instead is limited to violations that, as a matter of "the law of nations or a treaty of the United States," constitute a tort. And a tort, both at the time of this provision's enactment and today, means precisely a legally authorized civil action for damages.

II. 28 U.S.C. § 1350 Does Not Authorize Federal Courts to Incorporate International Law into U.S. Domestic Law

We do not dispute that Congress in enacting a statute may choose to incorporate a rule of international law into the law of the United States, and in doing so may specify what sanctions apply.

A review of U.S. practice suggests that Congress and the President, acting together through the legislative process, have bestowed on the federal courts the authority to interpret and apply international law in situations where the exercise of that capacity is consistent with the national interest. They have done so selectively and in response to particular concerns. These specific instances of delegating limited authority to the courts to determine the content of international law would have been superfluous if § 1350 meant what the court below claims it means.

An early and important example of delegation of the authority to determine international law is the creation of "admiralty and maritime jurisdiction," mentioned specifically in Article III § 2, cl. 1, of the Constitution and established by Section Nine of the Judiciary Act of 1789. As the leading treatise on the subject states,

> "It was assumed at first, and later expressly stated by all authorities, that those courts to which judicial jurisdiction over maritime cases was granted were thereby

> empowered and obligated to apply to such cases, in the absence of statute, the rules of the general maritime law."

Grant Gilmore & Charles L. Black, Jr., THE LAW OF ADMIRALTY 41 (1957). Thus, in *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 41 (1826), the Court declared that an unauthorized attack by a private armed vessel "may be punished by all the penalties which the law of nations can properly administer." And at the outset of the twentieth century, this Court similarly observed that a rule of decision "that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act" had become an established rule of international law, "is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter." *The Paquete Habana*, 175 U.S. 677, 708 (1900) (ascertaining content of international law for purposes of resolving an admiralty dispute). Early on the Court made clear that the rules of decision applicable to admiralty cases did not "arise under" the laws of the United States, except where a statute or treaty expressly displaced the common law. *See American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545-46 (1828).

One cannot infer from the establishment of admiralty jurisdiction, in which courts were given a special warrant to apply customary international law based on well-recognized causes of action in the absence of other legal authority, a general practice of authorizing federal courts to develop international law norms across the board. Article III explicitly authorizes the creation of admiralty jurisdiction.[6] It contains

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[6] At the time of the founding of the Republic, admiralty already was a well developed body of law of critical importance to a seafaring nation heavily dependent on maritime trade. The United States, then a relatively weak force internationally, had no reason to impose its own rules, but instead sought to reconcile its judicial practice with that of British and

no reference to international law other than treaties, whereas Article I, § 8, cl. 10 clearly assigns to Congress, and not the courts, the power to "define and punish . . . Offenses against the Law of Nations."

Another example of legislative authorization for federal courts to determine general rules of international law is the so-called Second Hickenlooper Amendment. Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(2), 78 Stat. 1009, 1013. This provision, a reaction to the decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), requires federal courts not to:

> "decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law, . . ."

The Second Hickenlooper Amendment had the effect of authorizing federal courts to employ principles of international law to determine when a state's expropriation of an alien's property would be actionable, in spite of this Court's expressions of reluctance, *Sabbatino*, *supra*, at 824-25, to determine on its own whether such law existed.[7] The courts have honored this command of Congress and, when necessary, have assessed the legality of governmental confiscations. *See*, *e.g.*, *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983)

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continental courts. This concern was particular and pressing, and not relevant to other aspects of international custom.

[7] Congress in 1976 supplemented the power of federal courts to deal with disputes over confiscation of property in violation of international law by authorizing jurisdiction over suits raising these claims against foreign sovereigns. *See* 28 U.S.C. §§ 1330(a), 1605(a)(3).

(international-law-based right of compensation can offset claim on letter of credit); *Banco Nacional de Cuba v. First National City Bank*, 478 F.2d 191 (2nd Cir. 1973) (Cuban seizure of bank property violated customary international law), *on remand from* 406 U.S. 759 (1972); *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir.) (Mexican imposition of restrictions on right to withdraw dollars from local banks did not violate international law), *cert. denied*, 482 U.S. 906 (1987). In each of these cases, however, the underlying right of action was not derived from international law, but rather was "a claim of title or other right to property," as specified in the Second Hickenlooper Amendment, based on state or foreign law.

Again, no inference can be drawn from the enactment of the Second Hickenlooper Amendment that Congress in 1964—let alone in 1789—contemplated that persons wronged by any and all violations of international law have an automatic right to sue for damages in federal courts. *Sabbatino* was a case where federal jurisdiction rested on alienage diversity jurisdiction (a suit by an instrumentality of a foreign government against citizens of a U.S. state) and where the defendants interposed a violation of international law as a defense to a claim based on a commercial contract. There is no evidence that Congress believed that victims of expropriations had any rights under § 1350, and the expressions of the *Sabbatino* Court about the undesirability of federal courts entertaining suits to vindicate the rights of owners of confiscated property, if anything, supports the opposite inference.[8]

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[8] This Court stated that:

> "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. . . It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations."

Yet another instance of the carefully calibrated incorporation of international law principles into U.S. domestic law is the enactment of 28 U.S.C. § 1330 as part of the Foreign Sovereign Immunity Act of 1976 (FSIA). Before enactment of the FSIA, foreign sovereign immunity in the United States rested on decisional law rather than a statute or treaty. Congress decided to supplant that body of law with the FSIA, which codifies the immunity enjoyed by foreign sovereigns and authorizes federal jurisdiction over all suits brought against foreign sovereigns where an exception to immunity exists. As this Court recognized in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the enactment of 28 U.S.C. § 1330 did not create any new rules of decision governing the conduct of foreign sovereigns, but rather established federal standards for determining when American courts could assert jurisdiction over claims arising under foreign, international, state, or federal law asserted against foreign sovereigns.[9] Of special relevance, in light of the Ninth Circuit's assertion that § 1350's grant of jurisdiction implies the authority to create a federal common law of international human rights, is the evident capacity of Congress to create federal court jurisdiction pursuant to the "arising under" prong of Article III, § 2, cl. 1, without at the same time conferring on the federal courts any authority to create a federal common law of international relations.

Sabbatino, *supra*, at 824-25. Under the reasoning of the court below, however, a federal court would be obligated to hear all such claims, at least if asserted by aliens, even if Congress never had enacted the Second Hickenlooper Amendment.

[9] In *Verlinden* the Court in particular recognized that the creation by Congress of a federal remedy for a claim arising against a foreign sovereign presented a question "arising under . . . the laws of the United States" sufficient to sustain jurisdiction under Article III, § 2, cl. 1, even though the substantive rule of decision on which a claim would be based did not arise under U.S. law. 461 U.S. at 492-97.

Another illustration of legislative incorporation of international law into domestic law involves the implementation of trade agreements. Section 102(b)(2), (c) of the North American Free Trade Agreement Implementation Act of 1993, *codified at* 19 U.S.C. § 3312(b)(2), (c), recognizes the legal force of a particular international agreement, *i.e.*, the North American Free Trade Agreement, but restricts domestic enforcement to suits for injunctive relief brought solely by the United States government. Section 102(b)(2)(A), (c) of the Uruguay Round Agreements Act of 1994, *codified at* 19 U.S.C. § 3512(b)(2)(A), (c), achieves precisely the same result, albeit with somewhat more precise and elaborate language, with respect to the Uruguay Round Agreements. These instruments provide rules of decision for lawsuits in the United States, but only if invoked by the federal government in the course of seeking injunctive relief against state and local governments. This clearly expressed desire of Congress runs contrary to the lower court's interpretation of § 1350, which, for example, might lead to a tort suit for seizure of property by a customs official (characterized as an unjustified injury to property in violation of customary international law) if that official could be shown to be acting inconsistently with one of the Uruguay Round Agreements and if a court were prepared to infer the existence of a rule of customary international law simply from the existence of an international agreement on the subject.[10]

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[10] Lest this extension of the reasoning of the court below seems too hypothetical, we would note that a number of lower court decisions did recognize a right to bring a civil action pursuant to the General Agreement on Tariffs and Trade (GATT), the predecessor to the Uruguay Round Agreements. *See* Territory of Hawaii v. Ho, 41 Haw. 565 (1957); Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal. App. 2nd 803, 25 Cal. Rptr. 798 (Dist. Ct. App. 1962). For commentators who applauded this outcome and called for its extension, see Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479 (1990); Robert E. Hudec,

Next, we consider the Torture Victim Protection Act of 1991 (TVPA), *codified as* 28 U.S.C. § 1350 note. Congress in that legislation adverted precisely to the conduct at issue in *Filartiga v. Peña-Irala*, 630 F.2 876 (1980), namely extra-judicial killing and torture carried out under authority of law in violation of fundamental and widely shared concepts of decency. As noted above, Congress referred to international standards to define an actionable extrajudicial killing. At the same time, however, Congress provided its own clear and precise definition of actionable torture, rather than referring to any definition found in various international conventions and instruments. If § 1350 meant what *Filartiga* and the court below claimed, this action by Congress would have been unnecessary and superfluous. Yet Congress enacted the TVPA precisely because it believed that victims of extrajudicial killing and torture carried out by the agents of foreign states otherwise might not have access to the federal courts to sue their tormentors.[11]

The Legal Status of the GATT in the Domestic Law of the United States, in THE EUROPEAN COMMUNITY AND GATT 187 (Meinhard Hilf, Francis G. Jacobs & Ernst-Ulrich Petersmann eds. 1986); John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 260 (1967); Note, *The United States Participation in the General Agreement on Tariffs and Trade*, 61 COLUM. L. REV. 505 (1961). Moreover, we note that the court below found a way, through its interpretation of § 1350, to provide a private action for damages to enforce the International Covenant on Civil and Political Rights despite the express declaration by the Senate, with the concurrence of the President, that such actions were not authorized. 331 F.3d at 620-21. Undoubtedly, ingenious courts similarly could find a way around the express command of 19 U.S.C. § 3512(b)(2)(A), (c).

[11] We say "might," because even before the enactment of the TVPA litigants could have brought claims in federal court to the extent that they satisfied the requirements of federal diversity jurisdiction under 28 U.S.C. § 1332. In cases such as *Filartiga*, the presence of aliens on both sides and no citizen of a U.S. state on either side would foreclose, as a constitutional matter, diversity jurisdiction. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).

Finally, we refer to the modern practice of the President and the Senate, when ratifying international treaties dealing with human rights, to state expressly that those instruments shall not give rise to a right to a civil action in U.S. courts.[12] President Carter first used this approach to meet objections to such treaties, and every subsequent administration, in cooperation with the Senate, has followed this practice. The clearly expressed concern of the political branches is that opportunistic litigants would exploit a right to sue for damages to alter the balance of robust protection of individual rights already existing under U.S. law, in spite of the conviction of the President and the Senate that the United States already meets its obligations under these instruments.

We provide this truncated and necessarily incomplete survey of U.S. practice regarding international law to show that the President and Congress incorporate international law selectively, and do not regard the federal judiciary as endowed with an across-the-board warrant to determine the content, scope and remedies of international law obligations in all instances where a dispute otherwise exists.[13] On occa-

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[12] For a review and defense of U.S. practice, see Curtis A Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000). For criticism of U.S. practice, see Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995). For a review of the practice of other states, see Catherine J. Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 INT'L & COMP. L.Q. 390. 391-404 (1997); Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 1993 BRIT. Y.B. INT'L L. 245, 269-78.

[13] Although these examples focus on the participation of Congress in the implementation of international law, the President, acting within the scope of authority delegated by the Congress and his independent Article II powers, can also implement international law. For example, in Article 15 of the 1920 Articles of War, Congress recognized the jurisdiction of military commissions over "offenses that by statute or by the law of war may be triable by such military commissions." Act of June 4, 1920, art.

sion Congress authorizes the judiciary to combine international rules of decision with domestic remedies, but U.S. practice also evidences a considered wariness about this practice and an unwillingness to authorize wholesale judicial enforcement of international rules. The interpretation of § 1350 by the court below is in clear opposition to this practice.

III. The Court Below's Interpretation of 28 U.S.C. § 1350 Would Hinder U.S. Participation in the Sound Development of International Law.

The decision of the court below opens up the prospect of virtually all violations of international law being converted into actionable torts within the jurisdiction of the federal courts, subject only to the limitation that *in personam* jurisdiction exist over the defendant. Under its reading of § 1350, aliens would have the right to sue other aliens for injuries inflicted anywhere in the world. The prospect of such suits in U.S. courts, we submit, will significantly interfere with the capacity of the United States to participate in the salutary development of international law.

At the outset, it is important to keep in mind the distinctive features of the U.S. civil litigation system:

–The civil jury trial as we know it is unheard of elsewhere in the world, save for rarely used discretionary trials in Canada and juries in libel actions in the United Kingdom and other Commonwealth countries.

–A person alleging injury can obtain the services of a lawyer without extending any money and normally will

15, 41 Stat. 759, 790 (contemporary version incorporated in the Uniform Code of Military Justice, at 10 U.S.C. § 821) (emphasis added). In establishing military commissions, Presidents have referred to this provision, most recently in Military Order of November 13, 2001, 66 FED. REG. 57,833 (Nov. 16, 2001). This example illustrates how the President, acting as Commander in Chief, may maintain rules derived from customary international law in proceedings necessary to the conduct of war. *See Ex parte Quirin*, 317 U.S. 1, 30 (1942).

not be liable for the defendants' legal fees if the suit is unsuccessful. Most jurisdictions elsewhere, by contrast, limit or forbid contingency fees, and many impose attorneys' fees on the losing party. Those foreign jurisdictions that provide for lawyers without cost do not give those lawyers an economic stake in the outcome of the litigation.

–A person bringing suit in a U.S. federal court has a right to sweeping pretrial discovery under the Federal Rules of Civil Procedure. We are not aware of any other jurisdiction that accords parties comparable rights, and foreign courts such as the British House of Lords have expressed concern about and opposition to the scope of U.S. pretrial discovery.[14]

–Generous U.S. rules on the recognition of class actions allows the multiplication of claims to augment the value of a lawsuit; the practice of most if not all other jurisdictions is much more restrictive.

–Finally, U.S. damages rules, which recognize open-ended compensation for pain and suffering and in some cases punitive damages, often lead to far greater awards than those available in other civil justice systems.

Taken together, these features make recognition of a right to sue for damages in a U.S. court a matter of great economic as well as political significance, especially in relation to rights to sue in other jurisdictions.[15]

[14] *E.g.*, *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] A.C. 547, 562-63 (H.L.) (British obligation under Hague Convention on Taking of Evidence Abroad does not extend to cooperating with request for interviewing witnesses and obtaining documents that lacks the specificity required under British law, even though requests conformed to U.S. Federal Rules of Civil Procedure).

[15] We make these observations not to suggest any criticism of any of these aspects of the U.S. civil litigation system, but merely to emphasize the significance of recognizing a civil action under U.S. law in

Confronted with a risk that the recognition of any particular obligation under international law may lead to costly litigation, the United States and other countries with which it negotiates face a serious dilemma. On the one hand, they may perceive areas of cooperation that would be to their mutual benefit and would like to rely on law to reassure each other of the seriousness of their commitment to cooperation. On the other hand, they may not want that commitment to invite the risk of costly private litigation and hefty jury verdicts. If they were unable to ensure that any agreement reached would not result in this risk, some otherwise valuable international agreements would not come about.

This argument is not speculative, but rather is confirmed both by history and contemporary events. Consider first the various human rights treaties that the United Nations sponsored in the decades after its founding. These include the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951; for the United States, Feb. 23, 1989); the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969; for the United States, Nov. 20, 1994); and the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; for the United States, Sep. 8, 1992). The reaction of the U.S. Senate to the promulgation of these instruments, which representtatives of the U.S. government had helped to negotiate, was that they raised the specter of legal challenges to aspects of the U.S. legal system that were either already undergoing sweeping change (such as de jure racial segregation) or were widely accepted but also controversial (such as the death penalty). Not only did the Senate initially refuse to consent to these conventions, but it seriously considered a constitutional

comparison to recognition of such an action under the law of other jurisdictions.

amendment that would have forbidden international law from having any domestic effect in the United States, absent an incorporating act of Congress. The Eisenhower Administration thwarted the effort to constitutionalize this issue, but only by representing to the Senate that it would not adhere to any international agreement that had as its purpose domestic law reform.

The United States eventually became a party to all these covenants, but only after the President and the Senate reached agreement that various reservations, understandings, and declarations would limit their legal force and in particular would foreclose the possibility of civil actions by private persons in U.S. courts. Reassured by these commitments, the Senate ultimately gave its consent to the treaties.[16] It is inconceivable that the President and the Senate meant these restrictions to be of no effect, yet the decision of the Ninth Circuit achieves exactly that result.

Another instance of the tension between international law creation and its enforcement through civil actions involves the Uruguay Round Agreements, which the United States signed in 1994 and which, pursuant to the Uruguay Round Agreements Act, entered into force for the United States on January 1, 1995. Uruguay Round Agreements Act of 1994, 108 Stat. 4809 (codified at 19 U.S.C. § 3511 *et seq.*) As we

[16] *See, e.g.*, Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 before a Subcomm. of the Senate Comm. on the Judiciary, 83d Cong.,1st Sess. 825 (1953) (statement of Secretary Dulles); U.S. State Dep't Circular No. 175, ¶ 2 (Dec. 13, 1955), *reprinted in* 50 AM. J. INT'L L. 784, 785 (1956); Four Treaties Relating to Human Rights, Hearing before the Comm. On Foreign Relations, 96th Cong., 1st Sess. 21 (1979) (testimony of Deputy Secretary of State Christopher); U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992); REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Exec. Rep. 102-23, at 10 (1992).

observed above, note 10 *supra,* some lower courts had indicated that the predecessor agreement, the General Agreement on Tariffs and Trade, had direct effect in U.S. law, and considerable academic authority urged that conclusion. Over the years, the United States saw the need for a more extensive set of agreements covering not just tariff reduction and nondiscrimination against imports, but a wide range of international economic issues. These agreements would affect many U.S. regulatory initiatives, including those aimed at public health and safety, that might be viewed in some quarters as *de facto* trade barriers. Congress appreciated the importance of these agreements, but also was deeply concerned about private litigants exploiting them to challenge legitimate regulatory programs at the federal and state level. The compromise that made adoption of these agreements possible is contained in 19 U.S.C. § 3512(b)(2)(A), (c), which forbids U.S. courts from enforcing these agree-ments except in the case of a suit for injunctive relief brought by the United States.

Finally, lawsuits recently filed in several U.S. district courts illustrate the destabilizing potential of the lower court's interpretation of § 1350. The end of the South African apartheid regime and the peaceful transition to majority rule in that country were extraordinary achievements. Many observers believe that the truth and reconciliation process that accompanied this transition was essential to its success. A broad cross section of political scientists and lawyers have seen this experience as a model for other societies making a transition from a repressive past to a free and democratic future. And an important part of the truth and reconciliation process was an amnesty from civil as well as criminal liability for those who cooperated with the designated authorities and

made a full disclosure of their role in the maintenance of apartheid.[17]

In the face of this delicate and important political compromise, several persons purporting to act on behalf of victims of apartheid in 2002 brought suits for damages under § 1350 against a number of multinational companies said to have been complicit in the maintenance of the former regime. *In re South African Apartheid Litigation*, MDL No. 1499 (S.D.N.Y.). The legal theory of these cases would extend not just to companies that did business in South Africa, but to anyone involved in administering apartheid, including precisely those persons who received official amnesties as part of the peace and reconciliation process.

It is difficult to overstate the potential for mischief that such lawsuits have, but under the interpretation of § 1350 propounded by the court below, as well as by the Second Circuit in *Filartiga*, such cases may be quite properly brought in a U.S. court, so long as that court is willing to infer the existence of a rule of customary international law simply from the fact that there exists a treaty addressing the same subject as the putative customary law rule. Experience over the last two decades demonstrates the desirability of nonviolent ends to authoritarian regimes, which on occasion has involved the establishment of some kind of immunity for persons who might otherwise thwart peaceful change. We do not mean to endorse any particular amnesty arrangement, but only observe that § 1350, as interpreted by the court below,

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[17] South Africa's Constitutional Court upheld the legislation providing for this amnesty in the face of the challenge that it allowed the architects of apartheid to escape full accountability. The court justified the amnesty as necessary for promoting the country's peaceful transition to democracy. Constitutional Court of South Africa, the Azanian Peoples Organization and Others v. the President of the Republic of South Africa and Others, CCT 17/1996, 25 July 1996. For a full discussion, see Kristin Henard, *Post-Apartheid South Africa: Transformation and Reconciliation*, 166 WORLD AFFAIRS 37 (2003).

could threaten to unravel many transition strategies adopted by emerging democracies.[18]

IV. Other States Do Not Permit Private Civil Suits for Damages Based Solely on Alleged Violations of General International Law.

A review of the practice of other countries establishes that there is no custom of providing a civil action in domestic courts for violations of general international law. To the contrary, authorization of civil suits by private persons for damages are relatively infrequent, and always rest on specific, particular, and express treaty or statutory commit-ments. Those treaties and statutes that do explicitly authorize civil actions reflect a background assumption that violations of international law normally do not give rise to such a right.

The most important international treaty contemplating some private remedies, including private suits for damages, is the European Convention for the Protection of Human Rights and Fundamental Freedoms. This instrument in many respects tracks the personal guarantees and protections found in the

[18] We recognize that statutes enacted in a handful of countries, in particular Belgium and Spain, appear to allow the public authorities to pursue criminal charges against former members of authoritarian regimes who might have benefitted from an amnesty. To the best of our knowledge, however, none of these jurisdictions allows private litigants to bring a civil action for damages against such persons. Furthermore, the scope of these countries' efforts is limited by the reach of their extradition treaties. In particular, the United Kingdom has interpreted its extradition treaty with these countries as not authorizing rendition of a person unless he or she is accused of an offense that would violate the statutory law of the United Kingdom, including those provisions specifying extraterritorial jurisdiction. In the particular case of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the House of Lords has ruled that it is bound by the terms of the Act of Parliament implementing that Convention. Accordingly, it will not order the extradition of anyone accused of torture occurring before the adoption of that Act, which does not have *ex post facto* effect. *Regina v. Bow Street Metropolitan Stipendiary Magistrate and others*, ex parte *Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (H.L.).

U.S. Constitution, in large part because it came into being in the aftermath of World War II. Adverting to the question of compensation for injuries, Article 13 states:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 41 of that instrument, in describing the function of the European Court of Human Rights, in turn states:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

Read in tandem, these provisions describe the Convention's remedial scheme, and in particular its approach to civil damages for violations. The jurisprudence of the European Court makes it clear that Article 13 imposes an obligation to provide an "effective" remedy, but states have considerable leeway in choosing how to investigate, assess, and compensate for Convention violations. The European Court has held that a state may meet this obligation by providing access to a civil action for damages as a means of compensation, and in at least one recent case has held that a substantial truncation of a right to a civil action, in the absence of other means of recourse against governmental actors, may constitute a violation of Article 13. *E. v. United Kingdom* (App. No. 33218/96), (Nov. 26, 2002) (awarding damages under Article 43 because British law at the time did not appear to provide a right to a civil action for negligence by child protection authorities). At the same time, the European Court has made clear that the existence of a right to a civil action against official actors is a sufficient, but not

necessary, means for a state to fulfil its obligation under Article 13. *Id.*

The European Convention does not require that states directly incorporate the norms of the Convention into domestic law, as long as domestic law effectively remedies Convention violations. In practice, not all parties do directly incorporate the Convention into civil law or make Convention violations actionable in the domestic courts. The United Kingdom, by the Human Rights Act 1998, did take this step, effective as of October 2000. One should note, however, that Parliament limited that enactment and did not make actionable violations of international law other than the European Convention. *See* Human Rights Act, 1998, c. 42 (Eng.).

British practice is reflected in other Commonwealth countries. Justice Kirby, in a concurring opinion, recently observed:

> "The main impact of the principles of universal human rights upon the development of tort law in this country, as in England and elsewhere, lies in the future."

Brodie v. Singleton Shire Council, 186 Australian L. Rptr. 145, 211 (Australian High Ct. 2001) (referring to international standards as support for particular interpretation of Australian common law). Similarly, although Canadian courts have referred to international human rights law as an aid to interpreting domestic law, including the development of domestic torts, they have not recognized any cause of action for civil damages based directly on international human rights law. *See, e.g., Schreiber v. Canada*, 216 Dom. L. Rptr. 513, 533-34 (2002) (Sup. Ct. Can.) (speculating that violations of human rights law might meet statutory requirements for waiver of sovereign immunity, but finding no violation).[19]

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[19] For commentary expressing a desire for Commonwealth courts to follow *Filartiga* while acknowledging that this has not happened, see TORTURE AS TORT—COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed.

A brief review of the practice in non-Commonwealth jurisdictions indicates that civil suits to seek damages for violations of international human rights law are virtually nonexistent. Some countries do allow victims of human rights violations to take part in criminal proceedings and to seek compensation in the course of those proceedings. This procedure is seen as satisfying the requirements of Article 13 of the European Convention. But such rights are derivative of and depend on a prosecutor's decisions to bring criminal charges. Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 18-21 (2002).

In sum, there is no international practice that treats violations of general norms of international law, and specifically the customary international law of human rights, as creating a right to a civil action for damages. Such rights to civil actions as exist rest on specific and limited treaty commitments, not general norms of international law. The interpretation of § 1350 by the court below not only does not reflect international practice, but in some respects may place the United States at risk of being found in violation of international law.[20]

2001); Human Rights Committee, International Law Association (British Branch), *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, 2 EUR. HUM. RTS. L. REV. 129 (2001).

[20] A refusal to recognize the immunity from suit of a high government official and the exercise of jurisdiction over activity with no connection to the forum state may constitute a violation of international law. The International Court of Justice recently has stated that a failure to respect the immunity from suit of high government officials violates international law. *Democratic Republic of the Congo v. Belgium*, [2002] I.C.J. ___ (criminal arrest warrant for Minister of Foreign Affairs). That decision did not resolve the issue of whether Belgium's assertion of universal jurisdiction also violated international law, but in the face of international criticism Belgium has modified its statute to make it applicable only to conduct having a jurisdictional nexus with that country.

V. The Argument that 28 U.S.C. § 1350 Provides a Cause of Action for Private Civil Suits Based on Alleged Violations of International Law Cannot Be Reconciled with the 190-Year Gap in That Statute's History.

A remarkable fact about § 1350 is that this provision, adopted by Congress in 1789 as part of Section Nine of the Judiciary Act, had no impact on U.S. litigation until its invocation by the Second Circuit in *Filartiga v. Peña-Irala*, 630 F.2d 876 (1980). One would have thought that, if the dramatic and sweeping implications of the reading assigned to the statute by *Filartiga* and its progeny corresponded in any way to the expectations of those who enacted this statute, that *someone* would have sought civil liability for a violation of the law of nations in the preceding 190 years. The absence of any record of such litigation weighs heavily against arguments for the correctness of that interpretation.

Our review of the case law suggests that there is no pre-1980 case where a federal court unambiguously based its jurisdiction on § 1350, and very few such cases where litigants sought this outcome.

Not long before *Filartiga*, the Second Circuit described § 1350 as a "kind of legal Lohengrin" (a reference to the magical knight who could not reveal his name or origin) in the course of rejecting an argument that an alleged fraud perpetrated on foreign investors was actionable under that statute. *IIT v. Vencap*, 519 F.2d 1001, 1015 (2nd Cir. 1975). This Court itself has ascribed to later sessions of Congress uncertainty over what, if anything, § 1350 does. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989).[21]

Loi relative aux violations graves du droit international humanitaire. (Loi du 5 August 2003) in Moniteur Belge, Aug. 7, 2003, p. 40506. Suits under § 1350 have the potential to raise both of these problems.

[21] A review of the secondary literature in the period before the *Filartiga* decision is not much more helpful in explaining the original understanding of § 1350. Professor Henkin's treatise did not discuss the provision, aside from speculating in a footnote that the statute suggests that Congress in 1789 may have believed that the "law of nations" was part of the "laws of the United States." Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 459 (1972). The treatise does not explain the basis for this inference, which seems inconsistent with the clear contemporaneous understanding of Congress that federal courts could apply the law of admiralty without that law becoming the law of the United States. The first tentative draft of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1980), which antedated *Filartiga*, made a similar passing reference to § 1350 and in at least some respects seems to treat that provision as having a much more limited scope than did *Filartiga*. *See* Paul B. Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 VA. J. INT'L L. 33, 44 nn. 38-39 (2003) (noting tentative draft's implication that statute would apply only to violations taking place on territory of United States).

Although the intention of Congress in enacting the portion of Section Nine of the Judiciary Act of 1789 that became § 1350 is murky at best, a few points are reasonably clear. First, Congress in that Act had no intention of exercising its power under Article III to create general "federal question" jurisdiction. It did not do so until 1875. Act of Mar. 3, 1875, § 1, 18 Stat. 470 (current version codified at 28 U.S.C. § 1331). Section Nine of the Judiciary Act, which deals with the district courts, focuses principally on admiralty jurisdiction, with cases "arising under" federal law limited to lesser federal crimes, challenges to seizures, penalties and forfeitures by the United States, and suits in which the United States was a plaintiff. Section Eleven of the Judiciary Act established diversity jurisdiction, but in the circuit courts and subject to a jurisdictional floor of $ 500 in dispute.[22] There is no evidence at the time that Congress believed that an action

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[22] Section Eleven also gave the circuit courts jurisdiction over more serious crimes under the laws of the United States, defined as those where the penalty exceeded a fine exceeding $ 100, imprisonment greater than six months, or corporal punishment greater than thirty stripes of the lash.

for a tort in violation of international law arose under federal law, and clear evidence that it believed that the law applied in admiralty does not arise under the laws of the United States. Second, it seems extremely doubtful that Congress believed that a suit by an alien against another alien would satisfy the requirements of diversity jurisdiction under Article III, given this Court's emphatic and conclusive rejection of such a proposition not many years after enactment of the Judiciary Act. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).[23]

An annotation in the Statutes of Large, which connects the language of the Judiciary Act that became § 1350 to a circuit court opinion by Justice Story, provides a slight hint of what Congress might have believed it accomplished with this provision. In the opinion, Story stated:

> "The district court as a court of admiralty and maritime jurisdiction, may entertain suits for all torts, damages, and unlawful seizures, committed upon the high seas, and other navigable waters, where the tide ebbs and flows."

Burke v. Trevitt, 4 Fed. Cas. 746, 747 (C.C.D. Mass. 1816), The suggestion, admittedly subtle, is that Congress may have thought that what is now § 1350 was necessary to ensure that admiralty courts heard not only disputes over the ownership of property, including salvage, but also all torts, including personal injuries, occurring within the maritime jurisdiction of the United States.

Recent historical scholarship also indicates that Congress understood that, to the extent that the language that became § 1350 authorized suits not encompassed by the grant of admiralty jurisdiction under Article III of the Constitution, Congress intended that the suit satisfy the requirements of Article III's diversity jurisdiction. This meant, as later

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[23] We note in passing that one of the members of the *Mossman* Court was Justice Ellsworth, who as a U.S. Senator had been one of the drafters of the 1789 Judiciary Act.

expressed in *Mossman v. Higginson*, 4 Dall. 12 (1800), that the claim would have to be brought against a U.S. citizen. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002). So understood, this portion of Section Nine of the 1789 Act was not redundant, even given the authorization of general diversity jurisdiction under Section Eleven of the 1789 Act, because Section Nine authorized jurisdiction in the district courts (with four sessions annually) rather than in the circuit courts (with only two sessions annually) and did not impose a dollar-amount limit. In sum, Congress expected that suits seeking compensation for a tort in violation of a treaty or the law of nations would have to satisfy the requirements of either admiralty or diversity jurisdiction under Article III, but would not have to meet the more onerous requirements of Section Eleven.

What we can state with confidence is that no one has come forward with persuasive evidence that Congress in 1789 believed it had authorized the federal courts to exercise general jurisdiction over claims based on international law or to apply international law as the law of the United States. No federal court held so until 1980. Decisions by several of the courts of appeals since then have purported to find in the statute both jurisdiction to hear claims and an authorization to develop a federal common law of international human rights, but none of these decisions has seriously attempted to relate the authority asserted to the intent of Congress or to explain the 190-year gap in the record. Rather, they have based their arguments largely on policy arguments for federal court enforcement of international law. Those arguments, for the reasons given above, are unsound.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In the

Supreme Court of the United States

JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

The Alien Tort Act (ATA), 28 U.S.C. § 1350, provides as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The questions presented are:

1. Whether the ATA is simply a grant of jurisdiction, or whether, in addition to granting jurisdiction, it provides a cause of action upon which aliens may sue for torts in violation of the law of nations or treaties of the United States.

2. If the ATA provides a cause of action, whether the actions it authorizes are limited to suits for violations of jus cogens norms of international law.

3. Whether a detention that lasts less than 24 hours, results in no physical harm to the detainee, and is undertaken by a private individual under instructions from senior United States law enforcement officials, constitutes a tort in violation of the law of nations actionable under the ATA.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. Litigating nationwide since 1973, PLF provides a voice in the courts for thousands of Americans who believe in a constitutionally grounded government, including adherence to the principles of separation of powers, democratic consent, and limited federal judicial powers. PLF has participated as amicus curiae in a vast assortment of cases heard by this Court over that time and, in so doing, has consistently argued that courts must avoid expanding the language of a legislative act where there is clear potential for a separation of powers problem. *See, e.g.*, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Food and Drug Admin. v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120 (2000).

PLF believes that its public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case. PLF has formally adopted an objective committing the Foundation to litigation for the purpose of reaffirming that international legal principles may not be judicially applied absent the consent of the political branches of the United States government. Acting on this objective, PLF participated along with Atlantic Legal Foundation as amicus curiae before the Second Circuit Court of Appeals in *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003), a case directly raising the issue of the role of customary

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[1] Pursuant to this Court's rule 37.2(a), all parties have consented to the filing of this brief. A stipulation letter evidencing such consent has been lodged with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

international law in United States law. *See* Martin S. Kaufman, et al., Brief Amicus Curiae of Pacific Legal Foundation and Atlantic Legal Foundation in Support of Respondents-Appellants *in Beharry v. Ashcroft*, *at* http://www.atlanticlegal.org/ beharry.pdf (June, 2000) (last visited Jan. 16, 2004). Intending to broaden its activity in this area, PLF has since committed to participating as amicus curiae in this important case.

STATEMENT OF THE CASE

The most controversial and far-reaching question raised by the Ninth Circuit's treatment of the Alien Tort Act (ATA) in the present case is what is required to state a violation of the "law of nations" actionable under the ATA. The lower court concluded that an international principle can be part of the "law of nations" and a violation of the principle therefore actionable under the ATA, even if the political branches of the United States government have not consented to such a definition of the "law of nations." Consequently, this case raises a specific issue, and the only issue addressed by amicus, concerning the role of the political branches, and particularly Congress, in determining what constitutes the "law of nations" for purposes of application in the United States.[2]

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[2] Amicus agrees with Petitioner's arguments that the ATA does not provide a cause of action given the absence of an express grant in the statute. Amicus also believes that such a cause of action should not be implied given the potential for interference with the conduct of foreign affairs delegated to the political branches of government. *See Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 801-05 (D.C. Cir. 1984) (Bork, J., concurring). These dangers largely depend, however, on the *content* of any right of action, not just its bare existence. Amicus accordingly believes it appropriate and necessary to direct this Court's attention to that content issue, particularly to the question of whether only legislatively adopted and accepted international principles can be actionable under the ATA.

Respondent Alvarez-Machain was present during the 1985 torture and murder of Drug Enforcement Agency agent Enrique Camanara-Salazar in Mexico. Alvarez-Machain was later indicted for participation in the murder of Camanara-Salazar and a warrant was issued for his arrest. In 1990, agents of the United States abducted Alvarez-Machain in Mexico and returned him to the United States to stand trial. After he was acquitted, Alvarez-Machain returned to Mexico and filed suit against the United States and its agents, seeking damages for his abduction and detention. One of his theories was that defendants were liable for their actions under the ATA and, more specifically, because the abduction and detention violated principles of "international customary law."

On June 3, 2003, an en banc panel of the Ninth Circuit Court of Appeals held that Alvarez-Machain could indeed hold the United States and its agents liable for the tort of arbitrary detention pursuant to a customary international legal principle forbidding such detention. In so doing, the court held that congressional consent to an international legal principle as part of the "law of nations" is not a prerequisite to an ATA suit under that "law." In short, the Ninth Circuit effectively concluded that, if enough other countries besides the United States favor an international principle, federal courts may enforce the principle against the United States under the ATA.

SUMMARY OF ARGUMENT

Unlike the "law of the United States," which is made by Congress and can be ascertained by examining the United States Code, there is no clear source or meaning for the "law of nations." *See* 2 Joseph Story, *Commentaries on the Constitution* § 1163 (2d ed. 1851) "[O]ffenses against the law of nations . . . cannot with any accuracy be completely ascertained, and defined in any public code, recognized by the common consent of nations."). Yet, if the ATA is to have content and force, the "law of nations" must be defined by

someone. Both by explicit command and structural imperative, the Constitution compels the conclusion that only Congress should have this power. Indeed, to avoid a construction of the statute that raises troubling constitutional issues, the Court should conclude that the "law[s] of nations" actionable under the ATA are those international principles which have been defined or recognized as part of the "law of nations" by the Congress or that have been otherwise adopted as judicially applicable law by the Congress through constitutional process.

ARGUMENT

I

APPLICATION OF INTERNATIONAL PRINCIPLES WITHOUT CONGRESSIONAL ACQUIESCENCE RAISES SERIOUS SEPARATION OF POWERS CONCERNS

The Ninth Circuit's fundamental conclusion is that federal courts may identify international rules as the "law of nations" applicable in the United States under the ATA, even in the absence of congressional recognition of a principle as part of the "law of nations" or the law of the United States. *See Alvarez-Mechain v. United States*, 331 F.3d 604, 620 n.15 (9th Cir. 2003); *id.* at 650 (O'Scannlain, J., dissenting); *id.* at 664 (Gould, J., dissenting). But this conclusion is not consistent with the language of the Constitution and the separation of powers principles upon which it is structured.

The Constitution grants only Congress the power to "define" offenses "against the law of nations." U.S. Const. art. I, § 8, cl. 10. More generally, it establishes a government of separated powers, with lawmaking powers vested in Congress, executive powers in the President, and judicial powers—the power to interpret and enforce the law—in the federal courts. *See* U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1. This structure, and the Constitution, are imperiled when the judiciary treads upon a power expressly delegated to another

branch or otherwise exceeds the proper scope of its authority. *See, e.g., Raines v. Byrd*, 521 U.S. 811, 820 (1997) (recognizing an "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere"). The lower court's conclusion that no congressional authorization is necessary for federal courts to apply a rule as the "law of nations" conflicts with these separation of powers standards.

A. The Lower Court's Decision Usurps Congress' Exclusive Power to Define the "Law of Nations"

The framers of the Constitution, many of whom were part of the Congress that passed ATA, anticipated that the fledgling United States would respect the "law of nations," which at that time consisted (at most) of "the law merchant, maritime law, and the law of conflicts of laws, as well as the law governing the relations between states." Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 821-22 (1989). But they well-understood that the "law of nations" was vague, could not be positively grounded in any source, and therefore subject to conflicting interpretations. *See* 2 Joseph Story, *Commentaries on the Constitution* § 1163 ("[O]ffenses against the law of nations . . . cannot with any accuracy be completely ascertained, and defined in any public code, recognized by the common consent of nations."); Committee of Detail, *The Records of the Federal Convention of 1787*, at 157 (Max Farrand ed., Yale Univ. Press 1966) (1911) (Madison's notes) (stating that the "law of nations is too vague and deficient to be a rule").

To reconcile the desire to respect the law of nations with the need to determine first what that law is, the constitutional framers granted *to Congress* the power "[t]o define and punish . . . offenses against the law of nations." U.S. Const. art. I, § 8, cl. 10. *See* Charles D. Siegal, *Deference and Its Dangers: Congress' Power to 'Define . . . Offenses Against the Law of Nations,'* 21 Vand. J. Transnat'l L. 865, 874 (1988). Indeed, during the constitutional debates, it was decided that the term

"define" should be added to the original draft of the Offenses Clause, which only referred to a congressional right to "punish." *See id.* at 875. Though the intent was probably not to allow Congress to *declare* the law of nations, the addition seems to have been meant to allow Congress to resolve and clarify ambiguities before proposed international principles became incorporated into United States law. *Id.* at 874 ("[T]he framers wanted to put Congress in a position to deal with uncertainties as to what the offenses were. There is some evidence that the framers believed [power under] the clause was not restricted to the 'offenses against the law of nations' recognized in 1789."). Indeed, the power to "define" "offenses against the law of nations" necessarily implies a power to define the "law of nations" itself, for one cannot identify a legal violation until the law is itself known, as the lower court's decision in this case aptly illustrates.

The federal courts have no similar constitutional authority. Although the framers initially considered giving the courts broad and express authority to adjudicate cases "arising under" the law of nations, this idea did not prevail. *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. at 830. General power to define offenses against the law of nations can be found *only* in the enumeration of Congress' powers. Since it is established that powers delegated to one branch of government should be considered exclusive, and not imparted to another branch through its "aggregate powers," the power to define offenses against the law of nations should be considered a unique prerogative of Congress. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (legislative power granted to Congress was an exclusive grant, which power could not also be found in executive branch through its aggregate powers). Courts encroach upon this prerogative when they independently enforce a principle as a violation of law of the nations. *See* Jason Jarvis, *Constitutional Constraints on the International*

Law-Making Power of the Federal Courts, 13 J. Transnat'l L. & Pol'y 251, 252 (2003) ("compliance with the Constitution mandates the federal courts' complete withdrawal from the determination or enforcement of non-statutory customary international law"). This is exactly what occurred in this case: the Ninth Circuit defined and punished "arbitrary detention" as a violation of the "law of nations," actionable under the ATA, even though Congress has not reached the same conclusion.

B. The Lower Court's Decision Assumes Lawmaking Powers That Properly Reside in Congress

The judiciary runs afoul of separation of powers principles when it engages in the functional equivalent of lawmaking, as well as when it usurps a power delegated to another branch of government. In a series of cases ending in the seminal decision of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court wrestled with the question of whether courts improperly legislate when they apply rules grounded in a free-floating general common law, "a transcendental body of law outside of any particular State," *Erie*, 304 U.S. at 79, rather than an act of a sovereign authority. During the Nineteenth Century, this Court repeatedly held that courts were within their proper powers when they resorted to this general law. *See, e.g., Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). But, after almost a century of sustained criticism, the Court reversed course in *Erie*.

Erie declared that "there is no general federal common law." *Erie*, 304 U.S. at 79. Instead, "law in the sense in which courts speak of it today does not exist without some definite authority behind it." *Id.* This conclusion followed from the conviction that an "unconstitutional course" was set out by "the ruling in *Swift v. Tyson* that the supposed omission of Congress to legislate as to the effect of decisions leaves the federal courts free to interpret general law for themselves." *Erie*, 304 U.S. at 91 (Reed, J., dissenting). Continued application of general common law principles not grounded in any federal or state legislative authority amounted to an "*"unconstitutional*

assumption of powers by the Courts of the United States.'" *Erie*, 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (emphasis added).

As recognized in *Erie*, the constitutional infirmity arising from application of a "general law" unlinked to a legislative act rested not only in federalism, as is commonly understood, but also in the separation of powers doctrine. *See* Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 Harv. L. Rev. 1785, 1793 (1997). Thus, *Erie* made clear that even if the federal *government* had power to make law binding on the states, the federal *courts* had no independent authority to do so. *Erie*, 304 U.S. at 78. *Erie* therefore ended the judicial practice of making decisions of federal law that were not grounded in the Constitution or a congressional act. *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313 (1981) ("[A] federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress."); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1261-62 (1996) ("[A]n essential premise of the Court's decision in Erie . . . appears to be that unilateral lawmaking by federal courts in this context violates the Constitution's separation of powers.").

Judicial decisionmaking under the "law of nations" is no different than decisionmaking under the general common law doctrine renounced in *Erie*. Indeed, the "law of nations" has historically been considered part of that same doctrine. *See Oliver Am. Trading Co. v. United States of Mexico*, 264 U.S. 440, 442-43 (1924); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1517-21 (1984). *Swift v. Tyson*, the decision expressly overruled by *Erie*, applied a general "law merchant" which was understood to be linked to the "law of nations." Logically, *Erie* halted federal judicial

development and application of rules arising under the "law of nations," but untethered to any legislative act. Though *Erie* generally directed courts to look to state legislative acts, in the absence of positive federal guidance, this does not throw the "law of nations" into state hands because here, there *is* an exclusive federal guide: it is Congress through its powers under the Offenses Clause. Consequently, *Erie* prevents courts from applying modern customary international principles absent congressional consent. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 852-53 (1997) (after *Erie*, a federal court cannot apply customary international law "in the absence of some domestic authorization to do so, as it could under the [nullified] regime of general common law").

Some of the Court's early decisions may appear inconsistent with the notion that courts can only apply the "law of nations" after Congress has clarified the scope of that law in the United States. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900). But these decisions predate *Erie*, and there is no persuasive reason for concluding that their broad understanding of a judicial right to apply the "law of nations" survived *Erie*. The argument that the "law of nations" is a uniquely federal area that should not be subject to the control of the states fails as a ground for expansive judicial power; the particular concern is indeed federal, but, again, it is one that has already been delegated by the Constitution to *Congress through the Offenses Clause*, not to federal courts.

Therefore, any doubt as to how *Erie* applies to early decisions relying on a legislatively ungrounded "law of nations" should be resolved here in favor of *Erie*'s unmitigated renunciation of those decisions. *See, e.g.*, Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 Va. J. Int'l L. 365, 393-463 (2002) (reviewing arguments for allowing application of the "law of nations" as common law

after *Erie* and concluding that such a position is inconsistent with *Erie* and in violation of constitutional principles). After *Erie*, the "law of nations" can be applied in court only after congressional action. Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 Mich. J. Int'l L. 450, 463 (1989) ("[M]odern decisions by United States courts based on principles of customary international law derived their authority from the United States body politic."). The alternate course, finding an unspoken exception in *Erie* for continued independent judicial development of the "law of nations," would "run counter to constitutional limits on the role of federal courts." *Tel-Oren*, 726 F.2d at 812.

II

TO AVOID SEPARATION OF POWERS PROBLEMS, THE COURT SHOULD REQUIRE CONGRESSIONAL CONSENT BEFORE AN INTERNATIONAL PRINCIPLE BECOMES ACTIONABLE IN THE UNITED STATES AS "THE LAW OF NATIONS"

The Ninth Circuit's assumption of judicial power to define the "law of nations" under the ATA is inextricably linked to its conclusion that such "law" can be ascertained from the principles in international human rights treaties and declarations. *See Alvarez-Machain*, 331 F.3d at 617-18. In several ways, this approach exacerbates the basic separation of powers problems identified above, *see infra* Part I, and reinforces the conclusion that congressional consent is a necessary condition for judicial application of the "law of nations."

First, independent judicial authority to define the "law of nations" opens the door for courts to assert increased control over policy questions better left in Congress' hands. Modern international human rights instruments purport to govern vast

areas of national social and economic policy; indeed, scholars have already identified the following as potential customary international principles: the right to food,[3] the right to equal education,[4] rights to a healthy environment,[5] a state obligation to use "precision munitions,"[6] inviolability of aboriginal territory,[7] "cultural property" rights[8] and sexual orientation rights.[9] While these may be goals worthy of pursuit, the manner

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[3] Anthony P. Kearns, Note, *The Right to Food Exists Via Customary International Law*, 22 Suffolk Transnat'l L. Rev. 223 (1998).

[4] Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 Harv. BlackLetter L.J. 37 (1994).

[5] *See, e.g.*, John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 Colum. J. Envtl. L. 283 (2000); Karyn I. Wendelowski, Comment, *A Matter of Trust: Federal Environmental Responsibilities to Native Americans Under Customary International Law*, 20 Am. Indian L. Rev. 423 (1995-96); Brian R. Popiel, Comment, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. Envtl. Aff. L. Rev. 447 (1995).

[6] Stuart Walters Belt, *Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas*, 47 Naval L. Rev. 115 (2000).

[7] Julie Cassidy, *The Enforcement of Aboriginal Rights in Customary International Law*, 4 Ind. Int'l & Comp. L. Rev. 59 (1993).

[8] David A. Meyer, Note, *The 1954 Hague Cultural Property Convention and Its Emergence Into Customary International Law*, 11 B.U. Int'l L.J. 349 (1993).

[9] James D. Wilets, *International Human Rights Law and Sexual*

(continued...)

and extent to which they are enforced in the United States is for the American people to determine through their congressional representatives, not the courts.

So far, Congress has resolutely refused to allow international human rights treaties and the policies they favor to supplant or supplement United States law in any way. *See* David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DePaul L. Rev. 1183, 1206 (1993) (reservations attached to international treaties out of "a desire not to effectuate changes to domestic law"); *International Covenant on Civil and Political Rights (ICCPR), Senate Comm. on Foreign Relations Report*, S. Rep. No. 102-23, at 14 (1992) (reservations to ICCPR preserving differences between United States law and the requirements of the ICCPR were designed to ensure that "changes in U.S. law in these areas will occur *through the normal legislative process*") (emphasis added).

But, the Ninth Circuit's recognition of an independent judicial power to define the "law of nations" allows courts to enforce international treaty policies and principles, under the ATA, even when they lack congressional support. This not only renders superfluous the Senate's right to consent *or* reject far-reaching treaties, it also provides the judiciary with a powerful mechanism for tinkering with American policy. Just as the Ninth Circuit used its assumed power to define the "law of nations" to pass judgment on United States policy regarding extraterritorial arrest, a future court might use the same technique to influence United States' environmental or immigration policy. *See, e.g., Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002) (customary international principle against arbitrary detention required federal immigration statute to

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[9] (...continued)
Orientation, 18 Hastings Int'l & Comp. L. Rev. 1, 119 (1994).

provide an additional hearing to an alien set to be deported, even in face of conflicting plain language of statute), *rev'd on other grounds, sub nom. Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 144 (2d Cir. 2003) (under the ATA, plaintiffs allege violation of customary international law rights to "sustainable development" and "health").

Moreover, an assumed judicial power to define the law of nations by reference to international treaty principles clearly gives foreign nations, even those that are outwardly hostile to the United States, a powerful mechanism for creating United States law. *See* Richard A. Falk, *The Role of Domestic Courts in the International Legal Order* 72 (1964) (assumption of international relations powers "principally entrusted by the Constitution to the Congress or the Executive" converts courts into "agent[s] of the international order"). International human rights agreements, and the potential customary international principles which they advance are, after all, created by nations which "are neither representative of the American political community nor responsive to it." Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. Rev. 665, 721 (1986). This is vividly illustrated by noting that the following nations have adopted the ICCPR, the instrument on which the Ninth Circuit heavily relies in this case to find a "law of nations" principle barring arbitrary arrest:

Iraq (pre-liberation)

Iran

North Korea

Afghanistan (pre-liberation)

Syria

Libya

Sudan

Somalia

Haiti

Colombia

See Signatures to United Nations Covenant on Civil and Political Rights, http://www.hrweb.org/legal/cprsigs.html (last visited Jan. 16, 2004).

While it may not be intrinsically objectionable for principles favored by these and other nations to influence the direction of United States law, *see* Sandra Day O'Connor, *Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law: Keynote Address*, 96 Am. Soc'y Int'l L. Proc. 348, 352 (2002) ("[A]cting in accord with international norms may increase the chances for broader alliances."), it is undoubtedly objectionable when this occurs through a judicial process that is largely immune from, and unaccountable to, the will of the majority of Americans. *See* James Madison, *Notes on Debates of the Convention of 1787*, Aug. 17, 1787, *at* http://www.yale.edu/lawweb/avalon /debates/817.htm (last visited Jan. 16, 2004) ("stating that 'no foreign law should be a standard farther than is *expressly adopted*'").

To preserve Congress' right to determine whether foreign principles will become part of United States law, and to avoid judicial encroachments on Congress' policy making role, as well as on its power to define offenses against the law of nations, congressional acquiescence[10] should be required before

[10] It is not necessary to identify all the congressional actions that might constitute consent to, or recognition of, a principle as part of the "law of nations," for purposes of allowing judicial application of the principle under the ATA. However, it is worth noting that a prior congressional consent requirement may be satisfied, as a practical matter, if the ATA is held to permit suits for some *jus cogens* norms, (continued...)

federal courts may apply and interpret an international principle as "the law of nations" in the United States, under the ATA or otherwise. *See* Trimble, *A Revisionist View of International Law*, 33 UCLA L. Rev. at 716 ("courts should never apply customary international law except pursuant to political branch direction").

As Justice Holmes explained a decade before *Erie*:

> [W]e must realize that however ancient may be the traditions of [international] maritime law, however diverse the sources from which it has been drawn, it *derives its whole and only power in this country from its having been accepted and adopted by the United States* . . . . When a case is to be governed by

[10] (...continued)
such as torture or piracy, or for some norms of the "law of nations" as understood *at the time ATA was enacted*, since a case can be made that congressional acts or the Constitution already recognize these limited norms as part of United States law. *See, e.g., Tel-Oren*, 726 F.2d at 813-14 (Congress may have meant ATA to allow suits for violations of rights of Ambassadors, safe-conduct, and for piracy, since these were well-understood at that time to implicate the law of nations and were specifically addressed in early federal statutes); Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 Chi. J. Int'l L. 421, 424 (2000) (discussing Congress' creation of a cause of action for torture and extrajudicial killing by 1991 enactment of the Torture Victim Protection Act). But the important point is not that some specific and narrow class of widely respected international norms are actionable, it is that some norms are actionable because they *enjoy the support of the American people through the actions of their representatives*. *See, e.g.*, Young, *Sorting out the Debate*, 42 Va. J. Int'l L. at 448 (noting that in ATA cases applying *jus cogens* norms, there appears to be "a domestic law filtering mechanism that determines which international norms are 'in' and which are 'out' for domestic purposes—an inquiry reminiscent of the . . . position that customary law may be applied only with some sort of domestic authorization").

> foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.

The Western Maid, 257 U.S. 419, 432 (1922) (emphasis added).

By following the path set out long ago in *Western Maid*, the Court will reaffirm the constitutional promise to "integrate the dispersed powers into a workable government. . . . [to] enjoin[] upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 635 (Jackson, J., concurring).

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed.

DATED: January, 2004.

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No. 03-339

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE THE EUROPEAN COMMISSION IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the European Commission is the executive body of the European Community, a treaty-based international organization that has competence to develop and enforce Community-wide legislation in specified areas of policy.[1] The European Community is presently composed of fifteen Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom). Ten new Member States (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia) will join on May 1, 2004. Under the treaty framework, the European Community and its Member States are both entitled to express views and to legislate on issues of extraterritorial jurisdiction in relation to their respective competencies.[2]

The Treaty establishing the European Community reflects a commitment to the rule of law, including the rule of international law. It recognizes that the rule of law requires due respect for, and an effective regime for the

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief. Petitioner has given blanket consent to the filing of *amicus* briefs. *Amicus* has obtained the written consent of Respondents to file this brief. The letters of consent are being filed separately.

[2] The European Community has taken a position on the extraterritorial effect of United States legislation on other occasions. *See, e.g.*, Council Regulation (EC) No. 2271/96, O.J. (L 309) 1 (Nov. 22, 1996) (adopted to counter extraterritorial effects of U.S. Cuban Liberty Solidarity Act and Iran and Libya Sanctions Act); *see also European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R., reprinted in* 21 I.L.M. 891 (1982).

enforcement of, fundamental human rights recognized by international law.[3]

The European Commission takes the view that, in order to respect the authority of States and organizations, like the European Community, exercising their authority to regulate activities occurring on their own territory, and hence to preserve harmonious international relations, States must respect the limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory.[4] For that reason, the European Commission has an interest whenever the United States adopts or applies laws that purport to govern or impose potential liability for conduct occurring beyond United States territory and that affect the areas of competence of the European Community.

United States courts have regularly applied the Alien Tort Statute 28 U.S.C. § 1350 to extraterritorial conduct. The statute is sometimes applied to reach conduct undertaken outside the United States by nationals of Member States of the European Community and legal entities organized under the laws of Member States of the European Community. Given that reach, *amicus curiae* the European Commission files this brief to urge this Court to interpret the statute, as a matter of both substantive standards and jurisdictional reach, in accord with the disciplined respect for the principles of international law that the statute incorporates.

[3] *E.g.*, Treaty Establishing the European Community, O.J. (C 325) (Dec. 24, 2002), arts. 177(2) & 181a(1); *see also* Treaty on the European Union, O.J. (C 325) (Dec. 24, 2002), arts. 6 & 11.

[4] *See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* ¶ 5 (February 14, 2002) (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) ("One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations.")

SUMMARY OF ARGUMENT

The European Commission does not support either party in this case. It also does not take a position on the question whether, in addition to conferring jurisdiction on federal courts, the Alien Tort Statute creates a cause of action for a tort in violation of the law of nations or a treaty of the United States. In the event the Court answers that question in the affirmative, the European Commission addresses the scope of the cause of action for a tort in violation of the law of nations.

Reflecting the respect of the founders of the United States for international law, this Court has insisted for at least two centuries, in accord with the principle first articulated in the *Charming Betsy* case, that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains."[5] Consistent with that principle, the Alien Tort Statute should be interpreted by reference to the substantive and jurisdictional limits set forth by the law of nations.

The substantive standards imposed by the Alien Tort Statute should be defined by reference to international law. United States courts should rigorously apply international law to determine the conduct that gives rise to a violation of

[5] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

the law of nations. In doing so, courts should rely upon well established means for identifying customary international law and should recognize only causes of action based on truly international standards. Customary international law is evolutionary in nature, so the norms encompassed by the Alien Tort Statute will change over time. Accordingly, United States courts should be careful to assess conduct by reference to the international law that existed at the time the conduct took place.

United States courts should also rigorously apply international law to determine the actors who may be subject to liability for a tort in violation of the law of nations. In particular, courts should recognize that only a subset of norms that make up customary international law apply to non-state actors, such as corporations. In determining whether a non-state actor was complicit in a violation of customary international law by a state actor, courts should also apply international, rather than domestic, legal standards.

The subject matter of the statute should also be defined by reference to the United States's jurisdiction to prescribe under international law. Where the United States has jurisdiction to prescribe based on territoriality, nationality, or the protection of its security interests, the Alien Tort Statute may be interpreted to incorporate all torts in violation of the law of nations. However, when the United States does not have jurisdiction under one of the traditional bases, it may exercise jurisdiction to prescribe only in accordance with the principles governing universal jurisdiction.

International law sanctions universal criminal jurisdiction in order to end impunity for violations of the most fundamental norms of international law, such as the prohibitions against genocide, torture, war crimes, and crimes against humanity. However, the existence and scope

of universal civil jurisdiction are not well established. To the extent that universal civil jurisdiction is recognized, it applies only to a narrow category of cases. Any exercise of universal civil jurisdiction should also be limited in accord with its rationale. Hence, a State should exercise universal civil jurisdiction, where that exists under international law, only when the claimant would face a denial of justice in any State that could exercise jurisdiction on a traditional basis, such as territory or nationality.

Simply put, assuming that Congress intended to create a cause of action when it enacted the Alien Tort Statute, the European Commission respectfully suggests that Congress intended federal courts not to breach the law of nations but to rigorously apply it. This Court would honor that intent by defining the scope of the cause of action created by the statute to incorporate the substantive content and jurisdictional limits imposed by international law.

ARGUMENT

I. THE SUBSTANTIVE STANDARDS IMPOSED BY THE STATUTE SHOULD BE DEFINED BY REFERENCE TO INTERNATIONAL LAW.

What the founders of the United States generally referred to as the "law of nations" is now more commonly called international law.[6] Because the Alien Tort Statute expressly refers to torts committed, emphasis added, "in violation of the law of nations *or* a treaty of the United States," United States courts have interpreted the reference to the law of

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[6] *Restatement (Third) of the Foreign Relations Law of the United States* 41 (Introductory Note to pt. I, ch. 2) (1987) [hereinafter *Restatement (Third)*] ("law of nations" later referred to as "international law"); J.L. Brierly, THE LAW OF NATIONS 1 (1928).

nations as a reference to a body of international law that is not based on treaties – namely customary international law.[7]

Customary international law is established by general and consistent practice of States followed by them from a sense of legal obligation, or *opinio juris*.[8] It includes, but is not limited to, *jus cogens* norms, which are fundamental, peremptory norms that permit no derogation and prevail over any inconsistent international law.[9] Customary international law does not include state practice based on social or moral, rather than legal, obligations, because such practice lacks the requisite *opinio juris*.[10]

The works of scholars may assist to identify customary international law. As this Court has taught, however, judicial tribunals look to scholarly work "not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[11] In other words, courts look to these works in order to determine *lex lata* (what the law is) rather than *lex ferenda* (what the law ought to be).

A. United States Courts Must Rigorously Apply International Law to Determine the Conduct that May Give Rise to a Tort in Violation of the Law of Nations.

It follows from the definition of customary international law that, in determining the conduct that may give rise to a claim for a tort in violation of the law of nations under the Alien Tort Statute, United States courts must respect four basic principles.

First, to State a claim for a tort in violation of the law of nations, United States courts must require a plaintiff to allege conduct that would violate norms that qualify as customary international law under the well established means by which

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[7] *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 143 (2d Cir. 2003). Another body of international law is comprised of "general principles of law recognized by civilized states," which form a source of international law, *see* Statute of the International Court of Justice, 59 Stat. 1055, June 26, 1945, art. 38(1)(c). United States courts, however, have not interpreted the Alien Tort Statute to authorize causes of action based on general principles.

[8] Statute of the International Court of Justice, *supra*, art. 38(1)(b) (identifying as source of international law "international custom, as evidence of a general practice accepted as law"); *North Sea Continental Shelf*, 1969 I.C.J. 4 ¶ 77; *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 29; *Restatement (Third)*, *supra*, at § 102(2).

[9] Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF 39/27, May 23, 1969, art. 53, *reprinted in* 8 I.L.M. 679 (1969); *Restatement (Third)*, *supra*, at § 102, cmt. k; *see also* Articles on Responsibility of States for Internationally Wrongful Acts, art. 26, adopted by the International Law Commission and noted by the General Assembly in 2001 (confirming widespread acceptance of *jus cogens*); James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 187 (2002).

[10] For an example of an examination of evidence of international law to determine whether a given norm had achieved the status of law, *see Flores*, 343 F.3d 140.

[11] *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also* J.L. Brierly, THE LAW OF NATIONS 41-42 (1928) ("No text-writer can create international law, but what he says may be valuable evidence of what the law is.").

such law is identified. For this reason, United States courts have held that allegations of conduct qualifying as torture, genocide, war crimes, summary execution, and arbitrary detention state claims under the statute,[12] but that claims based on norms that express aspirational goals rather than defined legal obligations, or that do not find sufficiently broad acceptance to qualify as customary international law, do not.[13] For example, the Court of Appeals for the Second Circuit recently held that the right to life and health were insufficiently definite to constitute rules of customary international law, and that there was insufficient evidence to establish a customary international law prohibiting intra-national pollution.[14]

Second, United States courts should bring within the statute only truly international standards – that is, standards that govern matters "of mutual, and not merely several, concern" of States.[15] For example, although murder may be universally proscribed by States in their domestic law, it should not provide a cause of action under the statute unless and until it reaches the level of international concern – in other words, unless it occurs in such circumstances or on such a scale that it would qualify as a war crime, a crime against humanity, or genocide.[16] For that reason, United States courts have regularly rejected claims based on domestic standards that do not involve matters of international concern.[17]

Third, because by definition customary international law evolves over time, United States courts must recognize that the norms encompassed by the Alien Tort Statute may also change over time. For example, at the time the statute was enacted, the principal offenses recognized under the law of nations were violations of the right of safe passage, infringements on the rights of ambassadors, and piracy.[18]

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[12] *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (torture actionable); *see also Kadic v. Karadzic*, 70 F.3d 232, 241-44 (2d Cir. 1995), *cert. denied*, 518 U.S. 1004 (1996) (genocide, war crimes, summary execution, and torture actionable); *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (war crimes actionable); *Mushikiwabo v. Barayagwiza*, 94 Civ. 3627, 1996 WL 164496 (S.D.N.Y. April 9, 1996) (torture and genocide actionable); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995) (summary execution and arbitrary detention actionable); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711 (N.D. Cal. 1988) ("*Forti II*") (causing disappearances actionable).

[13] *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 166-8 (5th Cir. 1999) (environmental torts and cultural genocide not actionable); *Aguinda v. Texaco, Inc.*, 1994 WL 142006, at *6-7 (S.D.N.Y. Apr. 11, 1994) (environmental torts not actionable); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 670-1 (S.D.N.Y. 1991) (environmental torts not actionable).

[14] *Flores*, 343 F.3d at 160-2.

[15] *Filartiga*, 630 F.2d at 888.

[16] *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (though all states prohibit theft, law of nations does not incorporate that norm).

[17] *E.g.*, *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1417-18 (9th Cir. 1995) (fraud, breach of fiduciary duty, and misappropriation of funds not actionable); *Cohen v. Hartman* 634 F.2d 318, 319-20 (5th Cir. 1981) (tortious conversion of funds not actionable); *Valanga v. Metropolitan Life Ins. Co.* 259 F. Supp. 324, 326-30 (E.D. Pa. 1966) (refusal to pay proceeds under insurance contract not actionable); *Damaskinos v. Societa Navigacion Interamericana* 255 F. Supp. 919, 923 (S.D.N.Y. 1966) (negligence and unseaworthiness of vessel not actionable).

[18] 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769); *see* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Joseph Modeste Sweeney, *A Tort in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).

Today, by contrast, customary international law reaches a broader range of conduct.[19]

Finally, and conversely, the evolutionary nature of customary international law requires that United States courts exercise care in order to assess conduct by reference only to norms that had crystallized into law by the time of the conduct alleged. Because individuals, States, and other entities capable of incurring legal liability are entitled to make decisions about their conduct based on the legal standards prevailing at the time they act, courts may not judge yesterday's actions by today's standards. In other words, the problem of "inter-temporal law" is addressed under international law, as under other systems, by application of "the general principle that laws should not be applied retroactively."[20]

B. United States Courts Must Rigorously Apply International Law to Determine the Actors Who May Be Subject to Liability for a Tort in Violation of the Law of Nations.

Just as courts must apply international law to determine any cause of action created by the Alien Tort Statute, so, too, must they apply international law in order to determine the actors who may be subject to the norms reflected in

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19 *E.g.*, *Restatement (Third)*, *supra*, at § 702.

20 Peter Malanczuk, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 155 (7th ed. 1997); *see Western Sahara*, 1975 I.C.J. 12, 37-40 (Advisory Opinion); *Island of Palmas Arbitration*, Reports of International Arbitral Awards II, 829, 845 (1928) (Huber, J.) ("a juridical fact must be appreciated in light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled").

international law and hence to liability under the statute for a tort in violation of the law of nations.

First, only a subset of norms recognized as customary international law applies to non-state actors, such as corporations, and hence only that subset may form the basis of liability against such actors. For example, non-state actors may be liable for genocide, war crimes, and piracy,[21] while torture, summary execution, and prolonged arbitrary detention do not violate the law of nations unless they are committed by state officials or under color of law.[22]

Second, United States courts must also apply international law to determine the circumstances in which a non-state actor may be held liable for a violation of a standard not directly applicable to that actor on the ground that the non-state actor was complicit in a violation of that norm by state actors. For example, in *Doe I v. Unocal*, the Court of Appeals for the Ninth Circuit looked to case law from the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda to ascertain the appropriate standard under international law to apply to a claim that a defendant in an Alien Tort Statute case had aided and abetted the violation of

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21 *Restatement (Third)*, *supra*, at 71 (Introductory Note to pt. II).

22 *E.g.*, *Kadic*, 70 F.3d at 241-6 (torture and summary execution); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) (torture); *Xuncax*, 886 F. Supp. at 184-5 (torture, summary execution, disappearance, and arbitrary detention); *Forti II*, 694 F. Supp. at 711 (causing disappearances); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541-43 (N.D. Cal. 1987) ("*Forti I*") (torture, summary execution and prolonged arbitrary detention); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794-5 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985) (torture).

a norm within the scope of the statute but directly applicable only to state actors.[23]

II. THE SUBJECT MATTER OF THE STATUTE SHOULD BE DEFINED BY REFERENCE TO THE LIMITS SET FORTH BY INTERNATIONAL LAW ON THE UNITED STATES'S JURISDICTION TO PRESCRIBE.

The law of nations includes not only substantive norms but also limitations on the authority of States to apply their own law to conduct outside their own territory. In accord with the *Charming Betsy* principle,[24] this Court should construe the Alien Tort Statute to define the subject matter addressed by the statute to extend only so far as the United States's jurisdiction to prescribe under international law.[25]

[23] *Doe I v. Unocal*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976, at *8-13 (9th Cir. Sept. 18, 2002), *reh'g en banc granted and opinion vacated*, 2003 WL 359787 (9th Cir. Feb. 14, 2003); *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, at ¶ 63 (March 31, 2003); *Prosecutor v. Furundzija*, IT-95-17/1-T, at ¶¶ 190-249 (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999); *Prosecutor v. Tadic*, IT-94-1-T, at ¶¶ 688-692 (May 7, 1997); Rome Statute for the International Criminal Court, U.N. Doc. A/CONF.183/9, July 17, 1998, art. 25(3)(c), *reprinted in* 37 I.L.M. 999 (1998).

[24] *The Charming Betsy*, 6 U.S. (2 Cranch) at 118; *Restatement (Third)*, *supra*, at § 114.

[25] *See Kadic*, 70 F.3d at 240; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 306 (S.D.N.Y. 2003); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 371 (E.D. Lou. 1997).

A. When Jurisdiction to Prescribe Is Based on Territory, Nationality, or Protection, the Alien Tort Statute May Be Interpreted to Incorporate the Full Body of the Law of Nations.

Jurisdiction to prescribe concerns the authority of States to apply their laws to certain activities, relations, and persons.[26] International law recognizes that States have jurisdiction to prescribe when there is a nexus between the conduct the State purports to regulate and the regulating State.

It is well established that States have jurisdiction to regulate conduct occurring on their territory (the territoriality principle); to regulate the conduct of their own nationals no matter where that conduct occurs (the nationality principle); and to regulate the conduct of non-nationals who are outside their territory when that conduct is directed against the security of the regulating State (the protective principle).[27]

Interpreting the statutory reference to torts in violation of the law of nations, United States courts have held that the statute reaches violations of "well-established, universally recognized norms of international law"[28] or "specific,

[26] *Restatement (Third)*, *supra*, at § 401.

[27] *Restatement (Third)*, *supra*, at § 402. The passive personality principle, by which States assert authority to exercise prescriptive jurisdiction based on the nationality of the victim, is irrelevant to the Alien Tort Statute because the statute permits claims only by aliens. As a practical matter, the effects doctrine, the validity of which as a matter of international law is subject to substantial controversy, would be unlikely to form the basis of an assertion of prescriptive jurisdiction over the conduct regulated by the Alien Tort Statute. Thus, this brief addresses neither of those asserted bases for prescriptive jurisdiction.

[28] *Filartiga*, 630 F.2d at 888.

universal and obligatory" norms.[29] To the extent these standards are applied to conduct on United States territory, by a United States national, or directed against United States's security interests, the statute falls within the United States's jurisdiction to prescribe under well established principles of international law. Hence, in interpreting the statute to reach such conduct, United States courts act in full accord with the *Charming Betsy* principle.

B. Where the United States's Jurisdiction to Prescribe Is Based on Universal Jurisdiction, the Alien Tort Statute Should Be Interpreted to Reach Only That Conduct Subject to Such Jurisdiction.

Universal jurisdiction permits States to exercise jurisdiction over matters of universal concern even when the State exercising jurisdiction has no connection with the case.[30] In the absence of a traditional basis for prescriptive jurisdiction, the Alien Tort Statute should not be read to reach claims based on all violations of the law of nations, but only such conduct as the United States would have authority to regulate under principles of universal jurisdiction.[31]

1. Principles of Universal Jurisdiction Authorize the Regulation Only of Specific Types of Conduct.

Modern international law recognizes two categories of conduct subject to universal criminal jurisdiction, which

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[29] *Hilao v Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

[30] *Restatement (Third)*, *supra*, at § 404, cmt. a.

[31] *United States v. Yousef*, 327 F.3d 56, 103 (2d Cir. 2003) (universal jurisdiction encompasses only limited set of crimes that cannot be expanded judicially).

correspond to the two basic rationales justifying such jurisdiction.[32] The first category is made up of conduct so heinous – such as genocide – that every State has a legitimate interest in its suppression and punishment. As to these crimes, universal jurisdiction increases the prospect that heinous wrongdoers will be brought to justice.

The second category is made up of serious crimes – such as piracy, the crime that prompted the development of the principle of universal jurisdiction – whose perpetrators might be able to avoid the ordinary jurisdiction of states. As to these crimes, universal jurisdiction provides a means of calling the wrongdoer to account when a case could not be brought in states that might exercise jurisdiction on traditional bases.[33]

Although the existence of universal criminal jurisdiction is well established, its scope continues to develop under treaty and customary international law.[34] For example, although universal jurisdiction does not apply to all norms

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[32] Vaughan Lowe, *Jurisdiction*, *in* INTERNATIONAL LAW 329, 343 (Malcolm D. Evans (ed.) (2003)).

[33] Lowe, *supra*, at 343.

[34] *See generally* International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses* 5-8 (2000) [hereinafter "I.L.A. Report"] (including genocide, crimes against humanity, war crimes and torture); *Restatement (Third)*, *supra*, at § 404 (including genocide, war crimes, piracy, slave trade, attacks on or hijacking of aircraft). Despite the authority normally carried by judgments of the Permanent Court of International Justice, its holding in *Lotus*, 1927 P.C.I.J., Ser. A, No. 10, at 19, that the exercise of criminal jurisdiction is permitted under international law unless affirmatively prohibited has been largely discredited. *See* Lowe, *supra*, at 335.

recognized under customary international law,[35] there is support under international law for universal jurisdiction over torture,[36] genocide,[37] war crimes,[38] and crimes against humanity.[39]

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[35] For example, systematic racial discrimination, such as apartheid, is widely condemned by states, but, at least at present, it does not give rise to universal jurisdiction because, among other reasons, the International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, 28 U.N. GAOR, Supp. 30, U.N. Doc. A/9030 (1973), Article 5 of which allows persons charged with an apartheid crime to be tried by a competent tribunal of any State Party, has not been widely ratified. *See* Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, 1991 RECUEIL DES COURS 9, 97; Christian Tomuschat, *Crimes Against Peace and the Security of Mankind in the Recalcitrant Third States*, *in* WAR CRIMES IN INTERNATIONAL LAW 41, 56 (Y. Dinstein and M. Tabory (eds.) 1996).

[36] Universal criminal jurisdiction is obligatory for states that are parties of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N.G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51 (1984), arts. 5(2) and is permitted generally under customary international law, *see Prosecutor v. Furundzija*, IT-95-17/1-T, at ¶ 156 (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999).

[37] Universal criminal jurisdiction is not provided by Article 6 of the Convention on the Prevention and Punishment of the Crime of Genocide 78 U.N.T.S. 277, December 9, 1948, but is accepted under customary international law. *Prosecutor v. Ntuyahaga* ICTR-90-40-T (Mar. 18, 1999); *Prosecutor v. Tadic*, IT-94-1-AR72, at ¶ 62 (Oct. 2, 1995). This rule is confirmed by state practice. *See, e.g., Attorney Gen'l of Israel v. Eichmann*, 36 ILR 277, 303-4 (Isr. S. Ct., 1962); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-3 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Prosecutor v. Jorgic*, Bundesverfassungsgericht (German Federal Constitutional Court), 2 BvR 1290/99 (Decision of December 12, 2000), *reprinted in* Neue Juristische Wochenschrift 1848, 1852 (2001).

[38] Universal criminal jurisdiction is mandatory for states parties to the Geneva Conventions for grave breaches, including willful killing, torture or inhumane treatment and willfully causing great suffering. First

Universal civil jurisdiction has received less attention than universal criminal jurisdiction, and its existence and scope are not well established under international law.

The Restatement takes the position that universal jurisdiction may apply in the civil context, and the Report on Universal Jurisdiction of the International Law Association notes that the United States has exercised universal jurisdiction in the civil context "with some success."[40]

Geneva Convention, 75 U.N.T.S. 31, August 12, 1949, art. 49; Second Geneva Convention, 75 U.N.T.S. 85, August 12, 1949, art. 50; Third Geneva Convention, 75 U.N.T.S. 135, August 12, 1949, art. 129; and Fourth Geneva Convention, 75 U.N.T.S. 287, August 12, 1949, art. 146. These offenses are listed under Art 8(2)(a) of the Statute of the International Criminal Court, but the application of universal jurisdiction to the other war crimes listed in Art 8(2)(b) is not yet established.

[39] Universal criminal jurisdiction exists over crimes against humanity that were recognized in art. 6(2)(c) of the Nuremburg Charter of the International Military Tribunal, 8 U.N.T.S. 279, August 8, 1945, including murder, extermination, enslavement, deportation, and other inhumane acts. The application of universal jurisdiction to the new elements of the crime listed in Article 7 of the Statute of the International Criminal Court, including the crimes of apartheid and forcible transfer of populations, is not yet established.

[40] *Restatement (Third)*, *supra*, at § 404, cmt. b ("In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy."); I.L.A. Report, *supra*, at 2-3; *see also* Robert Jennings & Arthur Watts, OPPENHEIM'S INTERNATIONAL LAW, 469-70 (9th ed. 1996) (citing *Filartiga* for proposition that serious violations of human rights, such as torture, are subject to universal jurisdiction). Some highly respected scholars have argued that international law imposes no limits on the exercise of civil jurisdiction by States. *See* Michael Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 145, 177 (1972-73); Gerald Fitzmaurice, *The General Principles of International Law*, 92 RECUEIL DES COURS 1, 218 (1957). This view commands little modern support since it is based on

Similarly, the International Criminal Tribunal for the former Yugoslavia has recognized the possibility of victims bringing civil suits for damages in foreign courts.[41]

At the same time, while Judges Higgins, Kooijmans, and Buergenthal, in their Separate Opinion in the *Arrest Warrant* case in the International Court of Justice, saw in the Alien Tort Statute "the beginnings of a very broad form of extraterritorial jurisdiction" in the civil sphere, they also noted that the United States's assertion of such jurisdiction in that statute had "not attracted the approbation of States generally."[42] By the same token, while Article 14(1) of the Convention Against Torture provides that each state party shall ensure that torture victims have an "enforceable right to fair and adequate compensation," there is disagreement whether the Convention requires States to exercise universal jurisdiction or simply jurisdiction over torture committed on their territory.[43]

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the same discredited approach taken in the *Lotus* case. *See supra* n. 34; *see also* F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 73-81 (1964); F.A. Mann, *The Doctrine of Jurisdiction Revisited After Twenty Years*, 186 RECUEIL DES COURS 19, 20-33, 67-77 (1984).

[41] *Prosecutor v. Furundzija*, IT-95-17/1-T, at ¶ 155 (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999).

[42] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* ¶ 48 (February 14, 2002) (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).

[43] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra*, art. 14(1). While the United States, in adhering to the Convention Against Torture, expressed its understanding that the obligation to provide a civil remedy extended only to torture committed on its territory, *see* U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Inhuman or

Finally, academic commentary on the existence and scope of universal civil jurisdiction is divided.[44]

International law is also unsettled as to the correspondence between the categories of conduct regulable as a matter of universal criminal jurisdiction and those regulable as a matter of universal civil jurisdiction. Several structural differences between civil and criminal jurisdiction counsel caution in recognizing universal civil jurisdiction.

Degrading Treatment or Punishment, Cong. Rec. S. 17486-01 (October 27, 1990); *see also* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 346, the text and the legislative history of the Torture Victims Protection Act of 1991, which implemented the Convention Against Torture as a matter of United States law, make it clear that that statute creates universal civil jurisdiction over torture. *See* Pub. L. No. 102-256, 106 Stat. 73 (Mar. 12, 1992); Torture Victim Protection Act of 1991, House Report No. 102-367 1, 4-5.

[44] *Compare, e.g.*, Beth Stephens, *Translating* Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002) (universal civil jurisdiction does and should exist); Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L. J. 141 (2001) (same); *with, e.g.*, Bradley, *supra*, at 343-9 (not clear that universal jurisdiction applies to civil jurisdiction and application of universal jurisdiction to civil cases more problematic than criminal cases); M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1130-4 (1999) (traditional justifications for universal jurisdiction inapposite to civil jurisdiction, but there may be arguments for reinterpreting doctrine). *See also* Special Rapporteur Theo van Boven, Economic and Social Council, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (1993), *reprinted in* 59 Law & Contemp. Prob. 283, 347 (1996) (states should maintain civil and criminal procedures with universal jurisdiction for human rights violations that constitute crimes under international law).

For example, States will generally exercise jurisdiction to try a defendant for crimes only when the defendant is within the State's custody, thereby limiting the scope of universal criminal jurisdiction, as well as the scope of civil actions attached to such jurisdiction.[45]

For another example, because in most States criminal prosecutions are initiated by and remain under the control of public authorities, criminal cases are subject to the plenary and unfettered discretion of public officials, who can take into account such considerations of public policy and international comity as they deem appropriate.[46] Thus, in deciding whether to bring or maintain a prosecution, public officials may consider whether another State is better equipped to exercise jurisdiction, or has a greater interest in

[45] *See, e.g., France,* Law No. 95-1 of January 2, 1995, art. 2, implementing Security Council Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia, *in* Official Journal of the French Republic 71; January 3, 1995; French Law No. 96-432 of May 22, 1996, art. 2, implementing Security Council Resolution 955 establishing the International Criminal Tribunal for Rwanda, *in* Official Journal of the French Republic 7695; May 23, 1996; Cour de Cassation, Decision of January 16, 998, 102 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 825, 827 (1998) (suspect must be present for exercise of universal jurisdiction for genocide and crimes against humanity); *Netherlands,* Dutch Hoge Raad (Hoge Raad der Nederlanden), No. 749/01 (CW 2323) § 8.5 (September 18, 2001), *available at* <http://www.rechtspraak.nl> (exercise of jurisdiction over torture committed abroad requires presence of accused). *But see Germany*, Federal Code of Criminal Procedure, art. 153f (2), No. 3 and 4, as amended by art. 3, No. 5 of the Law introducing a Federal Code on Crimes against international law (Völkerstrafgesetzbuch) (June 26, 2002), *in* Federal Official Journal, Bundesgesetzblatt, pt. I, 2253, 2259 (jurisdiction may be exercised over suspects not present but prosecutors allowed to close investigation if suspect not present and no presence expected).

[46] Bradley, *supra*, at 347.

exercising jurisdiction, because the act occurred on its territory or involved its nationals as perpetrators.[47]

At the same time, other factors counsel in favor of recognizing universal civil jurisdiction for those offenses that come within universal criminal jurisdiction. Some legal systems permit the recovery of monetary compensation by the victim as part of the criminal prosecution of the wrongdoer.[48] In these systems, civil jurisdiction would

[47] *E.g., Belgium*, Code of Criminal Procedure, art. 12a, No. 4, as amended by the law of August 5, 2003 on grave violations of international humanitarian law, *in* Moniteur belge (Official Journal) (August 7, 2003), *available at* <http://www.just.fgov.be> (prosecutor will request magistrate investigate complaint unless interests of justice or international obligations require matter be brought before international tribunal or tribunal of another state, provided alternative tribunal competent, independent, impartial and fair); *Germany*, Federal Code of Criminal Procedure, art. 153f (2) No.4 (prosecutor may decide not to investigate if jurisdiction based on territoriality or nationality of victim or suspect exists elsewhere); *Spain,* Spanish Supreme Court, No. 327/2003 (February 25, 2003), *reprinted in* 42 I.L.M. 686, 698 (2003) (deference given to courts in place where act committed unless authorities of that state impede prosecution or directly participated in crime).

[48] An *action civile* is accepted and practiced in Austria, Belgium, Denmark, France, Luxembourg, the Netherlands, Portugal, and Sweden, and is possible in Finland, Germany, Greece, Italy, and Spain. Yves Donzallaz, *La convention de Lugano du 16 septembre 1998 concernant la compétence judiciaire et l'exécution des décisions en matire civile et commerciale,* Vol. III, No. 5203-5272 (1998); *see also* Council Regulation (EC) No. 44/2001, O.J. (L 12/1) (January 16, 2001), art. 5, No. 4, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (civil claim for damages or restitution may be brought against person in Member State in which person not domiciled, provided that claim based on act giving rise to criminal proceedings and brought before court seized of those proceedings, to extent that court has jurisdiction under own law to entertain civil proceedings).

extend to the same category of cases as universal criminal jurisdiction, but it would also be subject to the same limitations, such as requiring the presence of the defendant before exercising jurisdiction.[49] While the recovery of damages in these systems is not fully comparable with universal civil jurisdiction, these systems demonstrate the difficulty in drawing strict distinctions between civil and criminal jurisdiction. They reflect, too, the broader point that criminal punishment and civil liability both operate, with different intensity, to vindicate important standards of conduct and deter future wrongdoing.[50]

Further, although the discretion of a national court to decline adjudication of a civil case may be more limited than that of public authorities to bring or maintain a criminal prosecution, there remain well established grounds on which national courts will decline to proceed in civil cases inappropriate for adjudication in the forum in which they are brought. For example, in the United States, particular facts and circumstances may require or permit a court to decline to proceed on grounds of lack of personal jurisdiction, *forum non conveniens*, or comity.

2. The Exercise of Universal Civil Jurisdiction Is Subject to Conditions that Comport With Its Justification.

If universal jurisdiction is justified by the international community's determination to end impunity for conduct that violates the most fundamental norms of international law, then the reach of that jurisdiction may properly be limited to conduct that would otherwise fall beyond effective sanction.

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[49] *See, supra,* n.45.

[50] Stephens, *supra*, at 51.

As a result, approaches to universal civil jurisdiction are emerging that favor the pursuit of remedies in States that may regulate the offensive conduct on traditional bases of jurisdiction.

A prime example is the Torture Victim Protection Act (TVPA), in which the United States Congress both implemented the Convention Against Torture and endorsed the prevailing interpretation of the Alien Tort Statute as a protection against other human rights abuses.[51] In the TVPA, Congress instructed United States courts to decline to proceed unless the claimant had exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.[52] Congress imposed this requirement in order to strike a balance between, on the one hand, the need to provide redress for victims of flagrant human rights abuses, considering that judicial protection is often least effective in those countries where abuses are most common, and, on the other, the need to ensure that United States courts would not intrude upon cases that could be more appropriately handled by courts where the alleged torture or killing occurred, the need to avoid exposing United States courts to unnecessary burdens, and the need to encourage the development of meaningful remedies in other countries.[53]

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[51] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (Mar. 12, 1992); House Report No 102-367 1, 3.

[52] Torture Victims Protection Act of 1991, *supra*, art. 2(b); *see Xuncax*, 886 F. Supp. at 179 (Art. 2(b) is not intended to create prohibitively stringent condition and not require exhaustion of unobtainable, ineffective, inadequate, or obviously futile remedies).

[53] Torture Victim Protection Act of 1991, House Report No. 102-367, at 1, 3-5.

The TVPA exhaustion requirement derives from a rule of general international law requiring that, before a claim may be asserted in an international forum, the claimant must have exhausted remedies in the domestic legal system.[54] This doctrine gives a State an opportunity to prevent, correct, or remedy conduct that would otherwise constitute a violation of international law. At the same time, to protect against a denial of justice and prevent wasteful resort to ineffective remedies, the doctrine excuses an attempt to exhaust when local redress is unavailable or obviously futile.[55] In similar fashion, an exercise of universal civil jurisdiction should be predicated on a showing that there was no reasonable prospect of redress in either a State exercising jurisdiction on a traditional basis or through an international mechanism.[56]

[54] The notion of exhaustion of local remedies was originally established in the area of diplomatic protection. *See Interhandel Case*, 1959 I.C.J. 6, 27 (Preliminary Objections) (local remedies rule well-established rule of customary international law); Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 472-81 (6th ed. 2003); Jennings & Watts, *supra*, at 522-6. It is also applied by international human rights bodies when determining the admissibility of individual applications.

[55] *Finnish Shipowners*, Reports of International Arbitral Awards III, 1484, 1535 (1934); *Norwegian Loans*, 1957 I.C.J. 39-40 (Separate Opinion of Judge Lauterpacht); *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct.H.R., Ser. C, No. 4 (1989) (Merits), *reprinted in* 95 I.L.R., 259, 291, 304-9; *Restatement (Third)*, *supra*, at § 703, cmt. d, § 713, cmt. f.

[56] Human Rights Committee, International Law Association (British Branch), *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, 2001 E.H.R.L.R. 129, 132. Support for a denial of justice rule in a civil law context also appears in the work of the Hague Conference on Private International Law on the proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. *See* art. 18 (3) of the preliminary Draft Convention adopted by the Special Commission of the Hague Conference on June 18,

The principle of complementarity reflected in the Rome Statute for the International Criminal Court imposes a similar rule of preference for local remedies. Under the Rome Statute, States that may exercise jurisdiction on the traditional bases are given the first opportunity to investigate and prosecute alleged offenders. If those States are unable or unwilling to proceed, however, a prosecution may be initiated in the International Criminal Court.[57] There is some support for the proposition that the same approach should be taken to the exercise of universal criminal jurisdiction.[58]

1991 but then revised in October 1999. In June 2001, the Nineteenth Diplomatic Session drew up a new version of this text that was not adopted. The drafts listed both accepted and prohibited bases of jurisdiction. Generally, a Contracting State would have to refuse to enforce a judgment rendered on a prohibited basis of jurisdiction, including where there was no substantial connection between the State that exercised jurisdiction and the facts of the case. However, art. 18 (3) provided an exception for States exercising jurisdiction over actions claiming damages for (a) genocide, crimes against humanity, and war crimes; and (b) certain other offenses where the party seeking relief would otherwise be exposed to the risk of a denial of justice because proceedings in another State were not possible or could not reasonably be required. Work on this Convention has effectively ceased. *See* <http://www.hcch.net/e/workprog/jdgm.html>.

[57] Rome Statute of the International Criminal Court, *supra*, Preamble (ICC complementary to national criminal jurisdictions); art. 17(1)(a), (b) (case generally inadmissible unless state with jurisdiction unwilling or unable genuinely to carry out investigation or prosecution).

[58] Universal criminal jurisdiction often involves a duty to extradite or prosecute suspects. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra*, arts. 5(2), 7. This may require some deference to states exercising jurisdiction under traditional bases of jurisdiction. *See* Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 895 (2003) (priority to prosecute belongs to the state of territoriality if it is willing and able to do so); *The Princeton Principles on Universal Jurisdiction*,

Just as the content of the customary norms encompassed by the Alien Tort Statute must be interpreted in line with the evolution of international law, so, too, must the scope of their application take account of the unsettled state of the law relating to universal civil jurisdiction and of the emerging conditions and limitations of its exercise.

CONCLUSION

The European Commission respectfully requests this Court, if it holds that the Alien Tort Statute sets forth a cause of action, to define the cause of action by reference to the substantive content and jurisdictional limits of international law. The substantive content of the law of nations requires courts to adhere strictly to the rules for identifying customary international law, while exercising care to avoid retrospective application of newly developed norms. Courts should also recognize the exceptional conditions under which individuals and corporations may be held liable under international law.

Further, the Alien Tort Statute should be interpreted to comport with limits on the United States's jurisdiction to prescribe. Hence, the Alien Tort Statute should be interpreted to reach conduct with no nexus to the United States only where that exercise accords with principles governing universal jurisdiction. The existence and scope of universal civil jurisdiction are not well established. To the extent recognized, it should apply only to a narrow category

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Principle 8 (2001) (providing criteria for determining whether states should prosecute or extradite); *see also Case Concerning the Arrest Warrant of 11 April 2000, supra,* ¶ 59(3) (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) (state contemplating exercising universal jurisdiction must first offer national State of suspect opportunity to act).

of conduct and should be exercised only when the claimant would otherwise be subject to a denial of justice.

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IN THE

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HUMBERTO ALVAREZ-MACHAIN, *et. al.*
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BRIEF OF THE GOVERNMENTS OF THE COMMONWEALTH OF AUSTRALIA, THE SWISS CONFEDERATION AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, originally enacted in 1789, created an implied Federal cause of action in U.S. district courts for aliens, wherever resident, to recover for torts "committed in violation of the law of nations or a treaty of the United States," even where the tort was committed by a non-resident alien outside the United States and had no substantial effect within the territorial (or admiralty) jurisdiction of the United States.

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INTEREST OF THE *AMICI CURIAE* [1]

The Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland, (hereinafter collectively, "the Governments") are committed to the rule of law as an essential part of an international civil society and a global

[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* made any monetary contribution to its preparation or submission. The written consents of petitioner Sosa and respondent Alvarez-Machain to the filing of this brief have been filed with the Clerk.

trading and investment system. They are also committed to the promotion of, and protection against violations of, human rights. But the Governments are opposed to broad assertions of extraterritorial jurisdiction over aliens arising out of foreign disputes because such litigation can interfere with national sovereignty and impose legal uncertainty and costs. While the Governments recognize that those who commit human rights violations should be held accountable, they believe that any broad assertion of jurisdiction to provide civil remedies in national courts for such violations perpetrated against aliens in foreign places is inconsistent with international law and the practice of other nations and may indeed undermine efforts to promote such rights and their protection.

The Governments provide full access to an independent judiciary as the means for their nationals and others subject to their jurisdiction to vindicate their legal rights and to recover just compensation for legal wrongs. The Governments are concerned that an expansive reading of jurisdiction by one country will undermine the policy choices made by other sovereign nations with regard to the proper vindication of rights and redress of wrongs.

The *Sosa* case (03-339), and numerous other cases pending in the lower courts, involve the novel assertion that U.S. courts have a broad charter, based on claims by alien plaintiffs wherever resident, to define "the law of nations" and to impose civil liabilities under U.S. law on foreign defendants for foreign activities that have no effect in the United States. Such a doctrine tends to interfere with the sovereignty of the Governments and other sovereign nations by subjecting their nationals and enterprises to (i) risk of conflicting legal commands and proceedings, and (ii) the costs and uncertainties of defending themselves against private lawsuits under ambiguous or unacceptable rules of law in a foreign forum. Moreover, if the practice of

the courts below were to be copied by other nations, the harm done to the amici and to the United States would be compounded.

This case offers the Court a clear opportunity to put to rest the mounting international uncertainty surrounding the Alien Tort Statute ("ATS") and thus minimize the potential conflict with other sovereigns that arises from assertion of jurisdiction under that statute.

The issues here reflect part of a broader and recurring concern by the developed countries with extraterritorial exercises of prescriptive jurisdiction by the U.S. Congress.[2] Further to this end, the United Kingdom intends to participate as an amicus curiae on a related issue of prescriptive jurisdiction in *Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, No. 03-724 (involving extraterritorial jurisdiction over foreign transactions under the U.S. antitrust laws).

ARGUMENT

I. U.S. LAW MUST BE CONSTRUED TO BE CONSISTENT WITH INTERNATIONAL LAW AND TO MINIMIZE CONFLICTS OF JURISIDICTION.

A. Basic Principles

It is a bedrock principle of international law that each sovereign Nation is equal and entitled to prescribe laws and to adjudicate claims regarding those persons within its sovereign territory. U.N. CHARTER art. 2, para. 1. *See also The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) ("No principle of

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[2] *See, e.g.*, July 15, 2003 Statement by Mr. Mike O'Brien, Minister for Trade and Investment, United Kingdom (expressing concern of the British Government about unwarranted assertions of extra-territorial jurisdiction in commercial cases), *available at* http://www.publications.parliament.uk/pa/cm200203/cmhansrd/cm030715/wmstext/30715m05.htm#30715m05.html_spmin3.

general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another").[3] Where jurisdiction is claimed by more than one sovereign state, the states exercising extra-territorial jurisdiction should do so in such a way that it is compatible with the exercise of jurisdiction by other states. An unwarranted assertion of jurisdiction may infringe the rights of another state to regulate matters that take place within its territory.

International law recognizes that the various grounds on which jurisdiction may be asserted are "parts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states". Sir Robert Jennings & Sir Arthur Watts, eds., *Oppenheim's International Law*, at 457-8 (9th ed. 1992).

The primary basis for jurisdiction under international law is territorial: each state may regulate activity that occurs in its own territory (the "territorial principle") and may extend the application of their laws to their citizens, wherever located (the "nationality principle"). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (hereinafter,

[3] Such a principle has importance beyond the mere adjudication of disputes but applies to the entire field of foreign relations among sovereign states. As one commentator has explained, "[t]he legal rules and principles governing jurisdiction have a fundamental importance in international relations, because they are concerned with the allocation . . . of competence to regulate daily life—that is, the competence to secure the *differences* that make each State a distinct society." Vaughan Lowe, *Jurisdiction*, in INTERNATIONAL LAW 329, 330 (Malcolm D. Evans ed., 2003) (emphasis in original).

"RESTATEMENT") § 402(1) (1987).[4] *See also* Lowe, *supra* note 2, at 339 (recognizing a state's application of its laws to citizens who have the nationality of the state, wherever they may be, as well as the assertion of territorial jurisdiction); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 921 (D.C. Cir. 1984) ("the territoriality base of jurisdiction is universally recognized. It is the most pervasive and basic principle underlying the exercise by nations of prescriptive regulatory power").

Meanwhile, the sometimes controversial "effects doctrine" (developed primarily in the field of antitrust law) may allow a state to assert prescriptive jurisdiction over events that have a clear effect in its territory, even if all planning and execution took place elsewhere. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993); *Gencor Ltd. v. Commission of the European Communities*, Case T-102/96, 1999 E.C.R. II-753. *See generally* RESTATEMENT § 402(1)(c) ("a state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory"); §403(2) (jurisdiction based on "the extent to which the activity . . . has substantial, direct, effect upon or in the territory").[5]

[4] U.S. courts rely on the RESTATEMENT as setting forth the "principles, derived from international law, for determining when the United States may properly exercise regulatory (or prescriptive) jurisdiction over activities or persons connected with another state." *See, e.g., United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 11 (1st Cir. 1997) (Lynch, J., dissenting), *cert. denied*, 522 U.S. 1044 (1998). *See also C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 421 n.3 (2001) (citing RESTATEMENT on issue of waiver of immunity from jurisdiction).

[5] The U.S. appears to recognize extra-territorial jurisdiction in other situations. *See, e.g.*, RESTATEMENT § 402(1)(d) (where necessary to protect the security of the state), but in each instance there is necessarily some connection between the activities or actors and the United States.

International law recognizes universal criminal jurisdiction in a few cases involving heinous crimes or piracy (*see* Lowe, *supra* note 2, at 343) (exploring instances of universal jurisdiction and justifications therefore); *see also* RESTATEMENT § 404 (recognizing that a state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern).[6] International law does not, however, recognize universal *civil* jurisdiction for any category of cases at all,[7] unless the relevant states have consented to it in a treaty or it has been accepted in customary international law.[8]

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[6] *But see* Stefaan Smis & Kim Van der Borght, *Introductory Note to Belgium's Amendment to the Law of June 16, 1993 (as amended by the Law of February 10, 1999) concerning the Punishment of Grave Breaches of Humanitarian Law*, 42 I.L.M. 740, 742 (2003) ("[u]niversal jurisdiction for serious international crimes . . . . is an area of international law in development. However, these developments in international law have neither been consolidated in a comprehensive treaty nor crystallized into clear customary rules" (footnotes omitted)).

[7] *Cf.* RESTATEMENT §404, cmt. b. ("In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy"). *See also Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980). Note, however, that neither the Restatement nor *Filartiga* cite any case in support of this principle. Moreover, the potential for "universal jurisdiction" in piracy cases does not detract from the lack of international acceptance of universal jurisdiction in a broader category of civil cases because piracy generally has not been an offense that took place on the territory of any sovereign nation and hence has not raised the types of issues currently being raised by the divers ATS cases.

[8] There have been a number of conventions or other agreements establishing crimes that are subject to universal jurisdiction. *See* examples listed in RESTATEMENT § 404 rep. n.1. A recent example of broader jurisdiction based on a treaty is found in the Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), codified as a note to 28 U.S.C. § 1350 (hereinafter "TVPA"), passed by Congress to implement, in part, the Convention Against Torture and Other Cruel,

Absent the recognition of universal jurisdiction for a particular matter (e.g., piracy), there is no basis in international law for the creation of an *explicit* U.S. civil cause of action involving disputes among aliens, wherever domiciled, based on foreign activities that have no effects within the United States. There is even less reason to assume that Congress would have created an *implied* cause of action that would be inconsistent with the developments in customary international law. *Cf. Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) ("'[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains'"), *quoting Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Consistent with this idea, this Court has generally limited implied prescriptive extraterritorial subject matter jurisdiction to legislative prohibitions of "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford*, 509 U.S. at 796. The reason is simple: a more expansive assertion of jurisdiction risks the potential for international conflict. Thus, the Court has often invoked the "long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'. . . . It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 284 (1991), *quoting Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), which had been ratified by the United States. The TVPA is contrasted with the Ninth Circuit's position on the ATS in Section IV below.

B. Potential Conflicts among Sovereigns

The greatest potential for international conflict comes when one country enacts a legal rule and provides a forum to settle disputes between citizens of another nation under a legal rule which that other nation regards as infringing its sovereignty or as otherwise offensive. *See e.g., Virgin Atl. Airways Ltd. v. British Airways PLC,* 257 F.3d 256 (2d Cir. 2001) (concerning landing slots at London's Heathrow and Gatwick airports). Indeed, the U.S. and other countries (including the U.K.) had been involved in another disagreement over the broad application of a law based on "universal jurisdiction" in a forum that had no connection with the activities alleged. In 1993, Belgium passed the *Act Concerning the Punishment of Grave Breaches of International Humanitarian Law.*[9] This law allowed Belgian courts to hear war crimes cases regardless of where the crimes allegedly occurred or the nationalities of those involved. In 2003, the Belgian Government agreed to drastically amend the law in response to strong protests from the U.S. and others.[10]

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[9] June 16, 1993, amended February 10, 1999, translated and reprinted as amended in 38 I.L.M. 918 (1999), amended April 23, 2003, translated and reprinted at 42 I.L.M. 749 (2003), amended August 7, 2003, translated and reprinted at 42 I.L.M. 1258 (2003).

[10] *See* Smis & Van der Borght, *supra* note 6, 42 I.L.M. at 745 ("strong pressures from Israel and the United States have led to a decision of the incumbent Belgian Government to introduce a new series of amendments that require a clear link with Belgium before a Belgian court can accept jurisdiction"). Criminal complaints were filed against former President Bush, Prime Minister Tony Blair and others under the law as it stood pre-amendment. Very recently, the High Court of Belgium dismissed a complaint against U.S. General Tommy Franks for conduct during the current conflict in Iraq in light of the 2003 amendments to the law. *See* Constant Brand, *War Crimes Complaint Against Franks Tossed,* Washington Post, Jan. 14, 2004, *available at* http://washingtonpost.com/wp-dyn/articles/A17388-2004Jan14.html.

Modern history is full of important differences between the United States and its major trading partners over the extra-territorial application of U.S. law. *See* Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extra-territorial Jurisdiction,* 6 Geo. Mason L. Rev. 505 (1998). Indeed, the U.S. was a leader in an expansive application of its antitrust laws under the "effects doctrine" to foreign parties engaged in foreign activities. One of the most visible U.S.-U.K. differences on this point arose out of the attempts by private U.S. plaintiffs to sue foreign uranium producers for entering into a government-supported cartel that was a partial response to a U.S. Government ban on imports. The ultimate result was the enactment of the Protection of Trading Interests Act of 1980 by the U.K. Parliament, 1980 ch. 11, and an important House of Lords decision against the leading U.S. plaintiff. *Rio Tinto Zinc v. Westinghouse Electric Corp.,* [1978] W.L.R. 81 (H.L. 1977). Importantly, the assertion of U.S. jurisdiction was based on the "effects doctrine", even though it was the U.S. Government that had blocked uranium imports. *See, e.g., In re Uranium Antitrust Litigation,* 617 F.2d 1248, 1253-54 (7th Cir. 1980).

The present case is even more troubling. The Ninth Circuit's formulation of the ATS requires no connection with the U.S. other than as the place for the lawsuit. The formulation applies U.S. law (including punitive damages) without any need to show: (a) any act within U.S. territorial or admiralty jurisdiction, (b) any effect on U.S. commerce, and (c) any effect on a U.S. citizen. *Cf.* RESTATEMENT §403 (indicating bases for exercise of jurisdiction when there is conflict with assertion of jurisdiction by another country).[11] Yet such a broad exercise of extraterritorial jurisdiction

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[11] In the context of criminal jurisdiction, the Belgian "war crimes" law (discussed at text preceding note 9, above) has been amended to allow actions only if the victim or defendant is a Belgian citizen or long-time resident at the time of the alleged crime. 42 I.L.M. 1258.

creates a number of risks in the international sphere. Apart from the risk that such exercises may violate international law or the forum's treaty obligations, there is a real risk that a broad assertion of jurisdiction will offend the sovereignty of other nations. There is also a substantial risk that a broad claim of jurisdiction will disrupt trade and investment in a global economy.[12]

II. THE COURT OF APPEALS ERRED IN FINDING THAT CONGRESS HAD CREATED AN IMPLIED FEDERAL CAUSE OF ACTION THAT WOULD ALLOW ALIENS TO SUE OTHER ALIENS FOR FOREIGN CONDUCT THAT HAD NO EFFECT IN THE UNITED STATES BECAUSE THE "LAW OF NATIONS" HAD BEEN ALLEGEDLY INFRINGED.

A. The Basic Error

The *Sosa* appeal involves a dispute in a U.S. court under U.S. law between two Mexican citizens then resident in Mexico concerning conduct in Mexico that the plaintiff alleges was a tort committed "in violation of the law of nations". Upholding this claim, the en banc majority of the Court of Appeals for the Ninth Circuit ruled that the ATS "not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations. . . . In other words, '[n]othing more than a violation of the law of nations is required to

[12] The risk of such litigation may also deter investment in developing countries, contrary to the policies of the Governments filing this brief and other nations, including the United States, designed to encourage such investment. *See* October 27, 2003 Letter from William H. Taft, IV, Legal Adviser, Department of State, to Shannen W. Coffin, Deputy Assistant Attorney General, Civil Division, U.S. Dept. of Justice, at page 3, filed *In re South African Apartheid Litigation*, MDL No. 1499 (S.D.N.Y. 2003), attached hereto at Appendix A (hereinafter, "Taft Letter").

invoke [the ATS].'" Pet. App. 11a, *quoting Hilao v. Estate of Marcos (In re Estate of Marcos, Human Rights Litig.)*, 25 F.3d 1467, 1476 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). Mexico's potential interest in enforcing its own laws concerning internal disputes was outweighed by "the policy of the United States, as expressed in the [ATS], to provide a remedy for the law of nations." *Id. at* 59a.

The Ninth Circuit committed fundamental error in determining that the ATS creates a Federal cause of action to settle foreign tort claims under U.S. law where the parties are foreign and there is no conduct or effect from the conduct in the United States.

The Ninth Circuit decision below seems to stand for the proposition that, if a nation is providing a remedy for some violation of "the law of nations", it may ignore the jurisdictional limits placed on sovereigns by "the law of nations". International law limits the circumstances in which a sovereign can exercise *prescriptive jurisdiction* (i.e., jurisdiction to legislate) over activities outside its territory, especially where those activities have no effects within the jurisdiction of the legislating sovereign. *Cf.* RESTATEMENT §§ 402, 403. By interpreting the ATS to invoke "universal jurisdiction" without the support of either treaty or customary international law, the Ninth Circuit's action itself runs contrary to the "law of nations". Moreover, both the substantive violation and the apparent jurisdictional reach of the ATS implied by the Ninth Circuit go beyond any vision of "the law of nations" that could have been understood by Congress in 1789 (as explained in Section III below).

B. The Decision's Broad Potential Reach

The decision below has broad ramifications going beyond the highly particular facts of the *Sosa* case. This is not the only time that the Ninth Circuit has applied the ATS in this way; and it has been joined by the Second and apparently the

Eleventh Circuits in doing so. Recognizing the broad-ranging implications of these expansive appellate readings of the ATS, U.S. lawyers have been assembling foreign plaintiffs to make ATS class action claims in Federal courts for foreign activities concerning "human rights violations" in foreign countries. These claims often implicate activities of governments in their own territories and thus can involve difficult political, diplomatic and legal issues. The reported cases include allegations of:

i. Terrorist acts,[13]
ii. Apartheid wrongs,[14]
iii. Environmental violations and related personal injury claims,[15]
iv. Wartime reparations claims,[16]
v. Child labor violations,[17]
vi. Forced labor,[18]
vii. Expropriation[19] and misappropriation[20] of property,

[13] *See, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 811 (1985).

[14] *See, e.g., In re South African Apartheid Litigation*, 238 F. Supp.2d 1379 (J.P.M.L. 2002).

[15] *See, e.g., Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Sarei v. Rio Tinto PLC*, 221 F. Supp.2d 1116 (C.D. Cal. 2002) (complaint further alleged that environmental damage and personal injury incited a civil war), *appeal docketed*, Nos. 02-56256, 02-56390 (9th Cir.).

[16] *See, e.g., Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2d Cir. 2003); In *re Austrian and German Holocaust Litig.*, 250 F.3d 156 (2d Cir. 2001).

[17] *See, e.g., Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 105 (2003).

[18] *See, e.g., Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3373 (U.S. Nov. 20, 2003) (No. 03-741); *Bao Ge v. Li Peng*, 201 F. Supp.2d 14 (D.D.C. 2000); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424 (D.N.J. 1999).

[19] *See, e.g., Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000).

viii. "Cultural genocide",[21]
ix. Murder and denial of rights to organize union activity[22]
x. Imprisonment and torture,[23]
xi. Racial discrimination, degrading treatment, and loss of enjoyment of political rights.[24]

The question is not whether these challenged activities are an appropriate source of international concern. Of course, they are—but they may not constitute a violation of the "law of nations" unless state involvement in the wrongdoing is shown.[25] Moreover, the solutions to such state-oriented wrongdoing may be multilateral co-operation or bilateral diplomatic action, rather than a national judicial process. In contrast, where individual malefactors are involved, the international community generally treats egregious human rights violations as *crimes* to be punished by domestic or international tribunals (as discussed in Section I above), rather than *torts* to be remedied primarily by damage awards in civil proceedings. Thus the question at bar is whether a unilateral assertion of U.S. civil jurisdiction against individuals or corporations is a legally acceptable (or even a fair and practical) way of dealing with foreign "human rights

[20] *See, e.g., Hamid v. Price-Waterhouse*, 51 F.3d 1411 (9th Cir. 1995), *cert denied*, 516 U.S. 1047 (1996); *Bodner v. Banque Paribas*, 114 F. Supp.2d 117 (E.D.N.Y. 2000).

[21] *See, e.g., Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289 (S.D.N.Y. 2003).

[22] *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp.2d 1345 (S.D. Fla. 2003); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp.2d 1250 (N.D. Ala. 2003).

[23] *See, e.g., Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988); *Filartiga*, 630 F.2d at 877-81.

[24] *See, e.g., Tachiona v. Mugabe*, 234 F. Supp.2d 401 (S.D.N.Y. 2002).

[25] *See Tel-Oren*, 726 F.2d at 776, 791-94.

violations" that have no significant effect within the United States and do not necessarily involve U.S. nationals as plaintiffs or defendants.

C. Conflicts, Unfairness and Litigation Difficulties

The Ninth Circuit's implied cause of action under the ATS creates enormous potential conflicts with other sovereigns exercising traditional territorial jurisdiction and bearing political responsibility for addressing domestic concerns. See Section IV, below.

The difficulty does not stop there. States are the primary objects of public international law, the body of law on which human rights violations generally rest. Sovereign immunity applies to governmental entities charged with ATS violations. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (foreign governments exempt under the Foreign Sovereign Immunities Act of 1976). *See also Joo,* 332 F.3d at 680-87(sovereign immunity applied to claim against Japan for slavery during World War II); *Industria Panifacdora, S.A. v. United States,* 957 F.2d 886 (D.C. Cir. 1992) (sovereign immunity for U.S. Government in ATS case), *cert. denied*, 506 U.S. 908 (1992). Thus, the main targets of modern ATS actions are necessarily individuals or enterprises which allegedly executed, assisted, conspired, or supported alleged governmental violations of "the law of nations". Thus, for example in the *South African Apartheid Litigation* (M.D.L. No. 1499), the Government of South Africa—appropriately—asserts its sovereign immunity, while several British, Australian and Swiss companies and numerous companies from the U.S. and elsewhere are the defendants left defending themselves against charges that they facilitated the former South African Government's well-entrenched Apartheid policies.

Civil litigation against private parties for the acts of a foreign government is teeming with practical problems and

potential unfairness to the defendants. These concerns are heightened where the private party defendant happens to be foreign and the government is absent because it is immune. Yet, this is precisely the structure of many of the cases brought under the ATS, as interpreted by the Ninth and Second Circuits, because the foreign governments are the source of the types of human rights violations being alleged in the ATS class actions referenced above. Nevertheless, it is enterprises and even individuals who are left defending themselves against an alleged "violation of the law of nations" by an exempt and absent government. Moreover, where the foreign government is not amenable to discovery directed by a U.S. court, the private party defendants face the difficult, if not impossible, task of showing that there was no "violation of the law of nations" by the foreign government or that the defendant was not part of any alleged violation.

III. THE ALIEN TORT STATUTE ("ATS") SHOULD BE READ IN THE CONTEXT OF ITS ORIGINS; AND AS SUCH WOULD NOT VIOLATE INTERNATIONAL LAW.

The ATS is but a single feature of the first Judiciary Act[26] in which Congress sought to establish a federal judicial system in response to Article III of the Constitution. Its origins are somewhat uncertain; it was of sufficiently minor importance that it did not generate any special explanation at the time of enactment. Thus the language in Section 9 that is now the ATS appears to have arisen from the desire in 1789 to protect foreign diplomats in the new U.S. Republic, and alien shipowners whose ships may have been improperly taken as prizes during wartime.[27]

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[26] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76 (1789).

[27] *Al Odah v. United States,* 321 F.3d 1134, 1148-49 (D.C. Cir. 2003) (Randolph, J., concurring) (scholarship suggesting that the "for tort only" language in the ATS was to deal with the situation where the owner of the

As noted above, the Ninth and Second Circuits' interpretation of the ATS as creating an implied cause of action has no basis in its origin. Moreover, it may be an assertion of universal prescriptive jurisdiction contrary to international law. This Court requires a more restrained approach (*see The Charming Betsy,* 6 U.S. at 118 ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . .")).

There are several ways that the ATS could be construed to avoid a conflict under international law. The first course (urged by the Solicitor General) would be to treat the statute as simply jurisdictional—i.e., giving the Federal courts subject matter jurisdiction over suits brought by aliens for certain torts defined by common law, admiralty law or other statutes. Such a course would reject the existence of an implied Federal cause of action under the ATS.[28] The second course would be to limit any implied ATS cause of action to what Congress would have assumed in 1789—both about what constituted the "law of nations", but particularly about the limits on the extraterritorial exercise of legislative jurisdiction.

A. Subject Matter Jurisdiction Only

The Solicitor General asserts that, "[t]he plain language . . . and history of the ATS strongly suggest that the provision only establishes subject matter jurisdiction over a particular class of suit, and does not create a private right of suit." *Brief of the United States in Support of Petition,* at 16.

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improperly-seized prize was suing for reparations, rather than return of his ship which would have already been subject to Federal admiralty jurisdiction). In the early years of the Republic, aliens would bring several important cases against individual states for infringing alien property rights that were supposedly protected by the Treaty of Paris of 1783, but these were apparently not tort cases under Section 9.

[28] This position is supported by D.C. Circuit decisions discussed below.

This position is supported by extensive concurring opinions by two respected jurists in two separate D.C. Circuit Court of Appeals cases. *Tel-Oren,* 726 F.2d at 811 (Bork, J., concurring); *Al Odah,* 321 F.3d. at 1145 (Randolph, J., concurring).

The Solicitor General's position, if adopted by this Court, would resolve the international problem that is of such concern to the Governments.

B. Territorial Limits on Prescriptive Jurisdiction

When the ATS was enacted, the basis for asserting substantive or legislative jurisdiction was territorial. *See, e.g., Schooner Exchange v. M'Fadden,* 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) ("[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself"). *See also American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356-57 (1909) (120 years after enactment of first Judiciary Act, Justice Holmes explained "the general and almost universal rule" was "that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done," *id.* at 356, but, when in doubt, a statute should be "confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power").

Hence the principal focus of Congress would necessarily have been on torts committed against aliens *within the United States or on the High Seas where no one country had jurisdiction.*

C. The "Law of Nations" as then Understood

Quite apart from jurisdictional coverage, it would have been entirely inconsistent with then-existing legal concepts for the first Congress to have (i) given the new federal courts

an open-ended mandate to define the "law of nations"[29] or (ii) created a broad, but unspecified, private cause of action based on such an undefined "law of nations".

The "law of nations", as understood in 1789, was a relatively limited concept. Twenty years earlier the scholar William Blackstone had explained: "The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4 William Blackstone, *Commentaries on the Laws of England*, 68 (1769), *quoted in Tel-Oren,* 725 F.2d at 813 ("a writer certainly familiar to colonial lawyers") (Bork, J., concurring). As Judge Bork notes, "[i]t is important to remember that in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover." *Tel-Oren,* 726 F.2d at 813.

D. So Little History, yet So Many Consequences

Neither Respondents nor the Ninth Circuit could seriously suggest that the first Congress could have contemplated, let alone have actually intended, the very broad civil action that the Ninth Circuit has implied from the enactment of Section 9 of the 1789 Act. Rather Respondent must contend that the ATS is one of those statutes where Congress intended to exercise its constitutional jurisdiction to the fullest extent and therefore the breadth of its statutory coverage should expand as the constitutional scope of federal jurisdiction expands. *See, e.g., United States v. South-Eastern Underwriters Ass'n,*

[29] Many members of the 1789 Congress and the first U.S. Administration, including Alexander Hamilton, had sat in the Constitutional Convention of 1787. They would have been familiar with both English law and Article I, Section 8, Clause 10 of the Constitution, which gave to Congress power to "define and punish...Offenses against the Law of Nations."

322 U.S. 533, 556-60 (1944). But Section 9 of the 1789 Act is hardly the Sherman Act (which was a major political event at the time of its enactment in 1890). Moreover, such an argument goes too far. An expansive reading of the 1789 Act to permit an implied statutory right of action would run contrary to international law and *The Charming Betsy* principle.

The better answer is the one given by this Court in an important admiralty decision some forty-five years ago. *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959). *Romero* raised the issue of whether federal question jurisdiction, first adopted in 1875, would support an attempt to bring a dispute between foreign parties into the U.S. courts under U.S. law. In rejecting such an expansive interpretation of federal question jurisdiction, the Court explained:

> "The history of archeology is replete with unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the [Judiciary] Act of 1875 was not uncovered by judges, lawyers or scholars for *seventy-five years* because it is not there."

Id. at 370-71(emphasis added).

This point must apply doubly to Section 9 of the Judiciary Act of 1789 which went almost *two centuries* before being unearthed as a broad, jurisdictionally unlimited sword, largely stemming from the Second Circuit's novel use of the Act in its *Filartiga* decision.

IV. THE UNITED STATES WOULD BE AT ODDS WITH THE LEGAL SYSTEMS OF OTHER NATIONS IF IT WERE TO ALLOW CIVIL SUITS FOR ALLEGED VIOLATIONS OF THE "LAW OF NATIONS" WITHOUT REQUIRING ANY NEXUS TO THE UNITED STATES.

A. Violations of Treaties and Customary International Law Do Not Create Private Rights of Action

As a matter of international law, violations of customary international law do not give individuals the right to bring civil claims in respect of those violations. We are not aware of any nation outside the United States, that currently accords individuals such a right. In addition, we know of no nation, let alone a major one, that seeks to exercise such unbounded civil jurisdiction over foreigners engaged in activities on foreign territory, absent a treaty obligation to do so.

Under U.S. law, treaties (or other international agreements) to which the United States is a party do not create enforceable private legal rights in the U.S. unless so stated in the treaty and the treaty is deemed to be self-executing. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.), *overruled in part on other grounds, United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). *See also Ware v. Hylton,* 3 U.S. (3 Dall.) 199, 244-55 (1796) (Treaty of Paris created right to pursue collection actions on debts created before the Treaty, notwithstanding state laws to bar such actions).

Yet the Ninth Circuit has been willing to create the "law of nations", enforceable by private parties, out of unratified treaties or even a treaty that was ratified on the condition that "it 'will not create a private cause of action in the U.S. courts.'" *See Al Odah,* 321 F.3d at 1145-47 (Randolph, J. concurring), *discussing Martinez v. City of Los Angeles,* 141 F.3d 1373, 1383-84 (9th Cir. 1998). The fact that potential

human rights violations are involved does not justify jettisoning well-established international law on jurisdiction of national courts over civil litigation.[30]

It is instructive to contrast what the Ninth Circuit has attributed to Congress in the ATS with what Congress did over 200 years later in enacting the TVPA, 106 Stat. 73. The TVPA is an explicit exercise of extraterritorial jurisdiction based on the "universality principle". It provides for a damage remedy against "[an] individual who, under actual or apparent authority, or color of law, of any foreign nation" engages in prohibited forms of torture (*Id.* at § 2(a)). The statute is, however, limited: "A court shall decline to hear a claim…if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim has occurred" (*Id.* at § 2(b)).[31] There is also a ten-year statute of limitations (*Id.* at § 2(c)). Moreover, this statute was passed by Congress to implement, in part, the Convention Against Torture and Other Cruel, Human or Degrading Treatment or Punishment, which had been ratified by the United States. S.Rep. No. 249, 102d Cong., 1st Sess., at 2-5 (1991).

B. An Assertion of Broad Jurisdiction May Lead Other Nations to Take Similar Positions

Finally it may be contrary to the United States' own interest to lead the way in asserting extraterritorial national jurisdiction over foreigners in areas not previously recognized by international law. As a celebrated writer and member of this Court, Joseph Story, observed:

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[30] The situation is different in the *criminal law* area, where international law has recognized *universal jurisdiction* for certain particularly heinous crimes.

[31] This contrasts with the failure of the U.S. courts to recognize an "exhaustion of remedies" concept in ATS cases. *See* discussion in text at note 36, below.

> "The true foundation on which the administration of international law must rest is, that rules which are to govern are those which arise from mutual interest and utility, from the sense of inconveniences which would result from a contrary doctrine, and from a sort of *moral necessity to do justice in order that justice may be done to us in return.*"
>
> Joseph Story, *Commentaries on the Conflict of Laws* 32-35 (2nd ed. 1841) (emphasis added).

Other nations might follow its lead, to the detriment of the U.S. and the general detriment of international law and order.

V. PRINCIPLES OF COMITY AND FORUM NON CONVENIENS SHOULD IN ANY EVENT BE APPLIED TO EXTRATERRITORIAL DISPUTES AMONG FOREIGN NATIONALS.

The Court of Appeals majority recognized that, "Mexico may in fact have competing interests—seeking to obtain compensation for its citizen, Alvarez, while limiting damages from Sosa, another of its citizens." Pet. App. 59a. However, the Court determined that Mexican law should not govern the dispute because of

> "[T]he policy of the United States, as expressed in the [ATS] to provide a remedy for the law of nations [citation omitted]. We agree with the district court that limitations on damages under Mexican law—including the unavailability of punitive damages—are not consistent with the congressional policy that underlies the [ATS]."

Id. at 59a (citation omitted)

Sovereign decisions on what legal rights, rules, and remedies should be available to its nationals and others injured by activities within its territory (or by its nationals) are important aspects of sovereignty that should be respected by U.S. courts under international law. Moreover, its judicial

or administrative processes are entitled to substantial deference under the doctrines of *forum non conveniens* and comity.

A. Differing Approaches of How to Define and Deal with Legal Wrongs

Substantial differences exist in the precise rules for defining torts in different common law and civil law systems. Some conduct may be legal in France, while it would be illegal in Australia, or vice versa. Some nations may impose statutory limits on tort damages, while others (particularly the U.S.) may allow tort damages that greatly exceed the plaintiff's actual losses in order to deter particular types of conduct. *But see State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408 (2003) (limiting punitive damages to awards having a reasonable relationship to compensatory damages). The point is not that one system is right and another is wrong; rather it is that tort rules and allowable recoveries are important legislative and judicial decisions that each sovereign should be allowed to make for its nationals and others within its jurisdiction.

It is not even necessary that all remedies for tort-like wrongs be judicial in nature. A responsible sovereign may prefer to have a political resolution that looks to the future rather than a backward-looking resolution based on litigation damages. Thus, *In re South African Apartheid Litigation,* MDL No. 1499, the post-Apartheid South African Government has taken the strong position that national reconciliation and any reparations to be made are fundamental political issues to be solved by South Africans using South African rules and institutions. As the President of South Africa has explained, "we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the

observance of the perspective contained in our constitutions of the promotion of national reconciliation."[32] This position has been strongly endorsed by the U.S. Department of State, which has emphasized: "the government [of South Africa now] pursuing these policies is broadly representative of the victims of the apartheid regime and [we] believe that this government is uniquely charged with a popular mandate to deal with the legacy of apartheid."[33]

Moreover, a sovereign (or a group of sovereigns) may establish by legislation or treaty a specialized tribunal or dispute resolution procedures for resolving alleged human rights violations, e.g., European Court on Human Rights,[34] or the new International Criminal Court.[35]

In dealing with ATS cases, the Ninth Circuit has not shown any particular sensitivity to these practical realities. Thus, courts in the Ninth Circuit have not recognized an *exhaustion of local remedies* concept, as exists under international law.[36]

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[32] Address to Parliament by President Thabo Mbeki (April 15, 2003) quoted in the Declaration of the Honorable Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, the Court in MDL No. 1499 on July 1, 2003 (See Appendix B).

[33] *Taft Letter, supra* note 5 (expressing concern about the adverse effect on U.S. foreign policy of continued prosecution of the cases consolidated as *In Re South African Apartheid Litigation*).

[34] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 19, 219 U.N.T.S. 222, 234.

[35] Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 (entered into force, July 1, 2002).

[36] *See Sarei,* 221 F. Supp.2d at 1132-39. The Defendant/Cross-Appellants in that case had urged the court to accept an exhaustion of local remedies rule as being required by international law. *See also* Rio Tinto Brief, Dkt. Nos. 02-56256, 02-56390 (9th Cir.). Should this "exhaustion of remedies" argument be successful, it would ameliorate, but not elimi-

Moreover, the Ninth Circuit has put aside the normal conflict of law rules because it has concluded that only the punitive damages available under U.S. law would be an adequate remedy against a violation of the "law of nations". Pet. App. 59a.

Even where a nation offers civil remedies to its residents for violations of the "law of nations" (or for human rights violations) that occur in its territory or on the High Seas, potential forum shopping is a practical issue. The U.S. has been a pioneer in developing rules that assist plaintiffs and hence it tends to attract litigation to the U.S. courts. These rules include:

- The U.S. does not have a "loser pays" rule on attorneys' fees and litigation costs that is the normal standard in the U.K., Australia and Switzerland and elsewhere.
- The concept of punitive damages is now largely confined to the U.S., but was a reason why the Ninth Circuit opted to apply the ATS rather than Mexican law. Pet.App. 59a.
- Large contingent fees for successful plaintiffs' counsel is a standard U.S. practice, but is much less accepted elsewhere.
- Class actions rules tend to be much more expansive in the U.S. than many other countries have been willing to allow. Such actions are particularly attractive to plaintiffs' counsel because they generate very large potential claims that can create heavy pressure on defendants to settle even doubtful claims. *See In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 147-59 (2d Cir. 2001)(Jacobs, J., dissenting), *cert. denied*, 536 U.S. 917 (2002).

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nate, the Governments' concern about the substantial potential adverse effects of the Ninth Circuit's acceptance of universal prescriptive jurisdiction in ATS cases

These procedural rules reflect political choices which the Federal Government and the U.S. States have made, and should be free to make. They become a matter of international concern only when combined with broad assertions of extraterritorial jurisdiction. This has clearly happened here, where ATS claims that involve foreign activities with no U.S. effect are brought into U.S. courts as class actions seeking to remedy an alleged violation of "the law of nations".

B. Comity and Forum Non Conveniens

In *Hartford*, this Court narrowly rejected comity as a consideration because the foreign conduct at issue was directed at the U.S. market, its principal effect was in the United States and foreign law did not require the defendants to engage in it. 509 U.S. at 797-9. In the ATS cases with which the Governments are most concerned (e.g., the *Apartheid* cases), there are no intended or actual effects in the U.S. and there is a general conflict with the foreign government over its policy vis-a-vis what is being sought in the U.S. under the ATS litigation. Therefore, if contrary to what we urge, the Court allows some implied right of action under the ATS, it should make very clear that comity and *forum non conveniens* principles apply.[37] Such cases would

[37] In *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) *cert. denied*, 532 U.S. 941 (2001), the Second Circuit reversed the district judge's application of *forum non conveniens* to claims by three Nigerians of human rights abuses in Nigeria. The defendants were a Dutch and a U.K. company involved in oil exploration and production in Nigeria. The district judge had specifically found that the U.K. would be a more convenient place to conduct the litigation and that there were no U.S. connections to the matter indicating New York as the appropriate forum. *Id.* at 92. However, the Second Circuit held that the district court failed to accord sufficient weight to factors including two of the plaintiffs had become U.S. residents, the plaintiffs' choice of forum, and the interests of the United States in providing a forum for adjudication of human rights abuses. *Id.* at 101-07.

be a far cry from *Hartford*, which dealt with governmental conflicts in relation to conduct that clearly had an effect on markets in the United States.

Too much litigation can be a risk to investment and commerce, as many American states have increasingly been forced to recognize in the medical malpractice area; and this practical and economic reality argues strongly against having the United States generate substantial extraterritorial litigation risks which deter legitimate enterprises from engaging in business and investment in poorer nations whose residents' lives may be improved by the presence of such enterprises.

CONCLUSION

The Governments of Australia, Switzerland, and the United Kingdom are concerned that human rights violations be dealt with fairly and promptly in appropriate fora. The question in this case is whether the Ninth Circuit has come up with the right resolution in the right forum. More particularly, the question is whether an implied right of action under U.S. law based on extraterritorial jurisdiction over entirely foreign actors and situations is provided by the ATS or consistent with international law. The answer to both questions, we respectfully submit, is "no".

For the United States to create a Federal cause of action against foreign nationals for conduct in foreign lands would interfere fundamentally with other nations' sovereignty, complicate international and local efforts to halt and punish human rights violations, and thereby weaken the "law of nations" that the ATS was intended to uphold. Moreover, because the Governments believe that human rights are, in the long run, more likely to be protected by building stronger democratic and legal institutions, the availability of ATS litigation in the U.S. will likely undermine political efforts to foster development of the rule of law and good governance.

As global trading and investing nations, Australia, Switzerland and the United Kingdom are concerned not only about interference with their own domestic dispute-resolution choices, but also that their enterprises and individuals are likely to be threatened with large damage claims because they have carried on normal business activities in a country that a U.S. court believes has engaged in violations of the court's version of "the law of nations".

Accordingly, the Governments of Australia, Switzerland and the United Kingdom respectfully urge that the ATS be restricted to cases which (i) have an appropriate connection with the U.S or (ii) involve activities by U.S. nationals.

Respectfully submitted,

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January 23, 2004

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APPENDICES

APPENDIX A

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

October 27, 2003

Shannen W. Coffin
Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Room 3137
Washington, D.C. 20530

Re: In Re South. African Apartheid Litigation.
MDL No. 1499 (S.D.N.T.)

Dear Mr. Coffin:

I am writing in response to Judge John E. Sprizzo's letter of August 7, which is attached hereto, and request that the Department of Justice submit this response to the Court. Judge Sprizzo inquired whether the Department of State believes that adjudication of the above-captioned litigation would have an adverse impact on the interest of the United States and, if so, the nature and significance of that impact. The Department's views are set out below.

At the outset, I reiterate the long-standing opposition of the United States Government to, and its abhorrence of, the institution and practices of apartheid and our commitment to helping the people of South Africa overcome their tragic past.

With respect to litigation in U.S. courts by alleged victims of apartheid, an initial concern relates to the Alien Tort Statute, 28 U.S.C. § 1350, which we understand is a central basis for the current apartheid cases. The statute has been addressed by a number of court over the past two decades,

including the Second Circuit in *Filartiga v. Pena-Irala*[1] and *Flores v. Southern Peru Copper Corporation*.[2] The United States Government has a substantial interest in the proper interpretation and application of this statute because it implicates profound separation of powers concerns and serious consequences for both the development and expression of the nation's foreign policy. The United States has recently taken the position in various pending cases that the Alien Tort Statute is a jurisdictional provision only and does not itself create any private causes of action. For the Court's convenience, I have attached a copy of the brief recently submitted to the U.S. Supreme Court by the United States in support of a petition for certiorari in *Sosa v. Alvarez-Machain* (No. 03-339).

More specifically with respect to the subject matter of the litigation, it is our view that continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the United States. The Government of South Africa has, on several occasions and at the highest levels, made clear its view that these cases do not belong in U.S. courts and that they threaten to disrupt and contradict its own laws, policies and processes aimed at dealing with the aftermath of apartheid as an institution. As Minister of Justice Maduna explained in his letter to the Court of July 11, 2003, the current Government of South Africa has taken extensive steps to promote reconciliation and redress for apartheid-era injustices. We note that the government pursuing these policies is broadly representative of the victims of the apartheid regime and believe that this government is uniquely charged with a popular mandate to deal with the legacy of apartheid.

---

[1] 630 F.2d 876 (2d Cir. 1980).

[2] 343 F.3d 140 (2d Cir. 2003).

Support for the South African government's efforts in this area is a cornerstone of U.S. policy towards that country. For that reason, we are sensitive to the views of the South African government that adjudication of the cases will interfere with its policy goals, especially in the areas of reparations and foreign investment, and we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations. To the extent that adjudication impedes South Africa's on-going efforts at reconciliation and equitable economic growth, this litigation will also be detrimental to U.S. foreign policy interests in promoting sustained economic growth in South Africa.

Various other foreign governments, including those of the United Kingdom and Canada, have also approached us via diplomatic channels to express their profound concern that their banks, corporations and other entities have been named as defendants. In light of their strong belief that the issues raised in the litigation are most appropriately handled through South Africa's domestic processes, we can anticipate possible, continuing tensions in our relations with these countries over the litigation.

We are also concerned that adjudication of the apartheid cases may deter foreign investments where it is most needed. The United States relies, in significant part, on economic ties and investment to encourage and promote positive change in the domestic policies of developing countries on issues relevant to U.S. interests, such as respect for human rights and reduction of poverty. However, the prospect of costly litigation and potential liability in U.S. courts for operating in a country whose government implements oppressive policies will discourage U.S. (and other foreign) corporations from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions. To the extent that the apartheid litigation in U.S. courts deters

such investment, it will compromise a valuable foreign policy tool and adversely affect U.S. economic interests as well as economic development in poor countries.

We would be pleased to provide any additional information the Court may require.

Sincerely,

/s/ William H. Taft, IV
WILLIAM H. TAFT, IV

Enclosures:
As stated.

APPENDIX B

[Logo]

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The Honourable Mr Justice John E Sprizzo
United States District Judge
United States Court House
500 Pearl Street
New York, New York 10007
UNITED STATES OF AMERICA

Dear Judge

(a) SOUTH AFRICAN APARTHEID LITIGATION (MDL NO.1499)

(b) KHULUMANI & OTHERS (CV 02 5952) '

I write to convey to the Honourable Court through my enclosed declaration the views of the Government of the Republic of South Africa regarding the South African apartheid litigation pending before the Court.

Respectfully yours

/s/ Dr. P M Maduna
DR. P M MADUNA, MP
Minister
Annexure

DECLARATION BY PENUELL MPAPA MADUNA

1. I am the Minister of Justice and Constitutional Development of the Republic of South Africa and a member of the cabinet of President Thabo Mbekl. I am an admitted attorney of the High Court of South Africa and hold the degrees of B. Juris, LL.B, LL.M as well as a LLD in constitutional law.

2. I make this declaration to set forth the South African government's ("the government") view of various cases pending in the United States courts against corporations that did business with and in South Africa during the apartheid period, including those cases consolidated under the caption, *In Re South African Apartheid Litigation,* MDL No. 1499 (S.D.N.Y.) and *In Re Khulumani & others*, CV 02 5952 (E.D.N.Y.) It is the government's submission that as these proceedings interfere with a foreign sovereign's efforts to address matters in which it has the predominant interest, such proceedings should be dismissed.

3.

3.1 By way of background, the Republic of South Africa is one sovereign democratiç state founded on the values of human dignity, equality, non-racialism, non-sexism, supremacy of the Constitution, and the rule of law, universal adult suffrage and a multi-party system of democratic government to ensure accountability, responsiveness and openness. Under South Africa's 1996 Constitution, the Constitution is the supreme law of the Republic. Under the Constitutional, the judicial authority of the Republic is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts, while all

other organs of the state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. An order or decision of a court binds all persons to whom and organs of state to which it applies. South Africa has a well developed judicial system, with the Constitutional Court at its apex and the Supreme Court of Appeal as the final court of appeal in non-constitutional matters. Judgments of the Constitutional Court and, indeed, the Supreme Court of Appeal, are widely admired for their independence and incisiveness and are frequently referred to in judgments of other final courts of appeal internationally.

3.2

3.2.1 The 1993 interim Constitution, which paved the way for South Africa's first democratic government in 1994, made provision for the establishment of a Truth and Reconciliation Commission (**"the TRC"**) in order to establish the truth in relation to **"past events"**, the circumstances under which gross violations of human rights occurred and to make such findings known. The purpose of the TRC was not simply to provide an account of the apartheid system, but to document gross violations of all human rights abuses, irrespective of their perpetrators, and to make provision for amnesty for those who made full disclosure of such politically-motivated human rights violations and to provide reparations for the victims of such abuses. In 1995, Parliament enacted legislation to establish the TRC formally. In taking these constitutionally-mandated steps, government deliberately avoided a **"victors' justice"** approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill.

3.2.2 The 1993 Constitution and the Promotion of National Unity and Reconciliation Act, 1995, which established the TRC, was based on a conscious agreement by all political parties in South Africa to avoid Nuremberg-style apartheid trials and any ensuing litigation.

3.2.3 The TRC completed its work in March 2003. It-granted amnesty to many perpetrators of gross violations of human rights on a cross-party basis. It also recommended financial reparations for some 20 000 victims of such abuses. In his address to Parliament on 15 April, 2003, on the tabling of the TRC Report, President Thabo Mbeki on behalf of the government. observed that:

> **"In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African Government is not and will not be party to such litigation.**
>
> **In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation".**

3.2.4 It is .my respectful submission that the government's views on .matters which fall within its sovereign domain should be respected in all forums.

3.3 I believe that it is Important for the court to understand the context in which these cases are brought. The litigation appears to suggest that the government of which I am a member, has done little or nothing about redressing the ravages of the apartheid system, which,

while formally and institutionally terminated by the election of the Mandela government on 27 April 1994, continue to live with us and will, unfortunately, continue to endure for many years to come. It likewise fails to appreciate the mandate under which South Africa's first democratic government was elected and how it has gone about executing this mandate since 1994. In order to assist the court, I set out briefly the details of this below.

4. In addition to institutionalising enforced racial segregation, and denying the majority the franchise, the apartheid system sought systematically to exclude most South Africans from access to adequate education, health care, housing, water, electricity, land and communications, while likewise excluding it from proper participation in the economy. The African National Congress-led government, under the leadership of former President Mandela, was elected in 1994 by the previously apartheid-excluded majority on a programme specifically to redress the legacy of apartheid. The government's programme, based on the reconstruction and development of the South African economy, accordingly had and continues to have as its central plank the fundamental transformation of South African society. It does so by attempting to rehabilitate the lives of the previously disadvantaged through the promotion of non-racialism, equality and social justice. The implementation of this policy, as will be seen below, has been and continues to be achieved through wide-ranging legislative reforms to transform South African society. In other words, what the government is attempting to do is to repair the damage caused by the apartheid system through a broad programme of socio-economic reparations which has at its heart, the betterment of the lives of the previously disadvantaged.

5.

5.1 South Africa's 1996 Constitution, which the African National Congress was instrumental in drafting, gives effect to government policy to redress the wrongs of the apartheid system, by not only prohibiting all forms of discrimination, but also by guaranteeing the right of all South Africans to access to housing, education, health care and related social services. Under the Constitution, the government is obliged to meet these socio-economic rights within the limits of its resources. The central importance of these provisions of the Constitution is, however, transformative and redistributive, in order to enable all South Africans to overcome the legacy of apartheid, through the creation of a more just and egalitarian society. Although, the government has obviously not met all of its 1994 goals, its record, faced with the realities of a globalised economy is, I submit, impressive.

5.2 In education, the spending disparity on white and black learners (18:1 in 1970 was reduced to 3:1 by 1993) was eliminated by racially integrating schools while at the same time, directing the bulk of state expenditure to the neediest schools. In addition, free primary and secondary level education will be available to the poorest 40% of the population from 2004. Government remains committed to reducing adult illiteracy.

5.3 Skewed land ownership is being addressed through legislation which provides for the restitution of land taken from black South Africans under race-based legislation first introduced in 1913. Further laws provide for the redistribution, with state assistance, of some 30% of commercial farming land to emerging black farmers.

5.4 Social pensions (equalised prior to 1994) have now been extended to many more beneficiaries and supplemented by school feeding schemes, free medical treatment at state hospitals for pregnant women and children under the age of six, and a child support grant. Substantial Increases have been made in providing state financial support, especially to children, with more than eight million people expected to receive social assistance grants by 2005 compared with 2.7 million in 1997. Government is currently rolling out state financial support for children between the ages of seven and fourteen years, over a seven year period.

5.5 At the same time, government has adopted a range of legislative measures aimed at overcoming racial inequality, including the Employment Equity Act of 1998, and the Preferential Procurement Policy Framework Act of 2000. The vast bulk of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, came into effect on 16 June, 2003.

5.6 A good example of achieving majority participation in the economy is the Minerals and Petroleum Resources Development Act of 2002, which is due to come into force in late 2003. This vests all mineral rights in the state and grants new mining licences to applicants in return, among other things, for comprehensive endeavours to promote black economic empowerment. The objectives here include the transfer of ownership to black South Africans of at least 26% of equity or operating assets within ten years under a broad-based mining charter agreed with the South African mining industry. Likewise, a Black Economic Empowerment Bill, intended to promote black economic empowerment in other sectors through measures such as affirmative

action, preferential procurement, and equity transfer" in favour of black South Africans, is currently before the South African Parliament.

6. While the government's job is to govern in a way which is best for the people as a whole, it cannot ignore the fact that it is the successor government to the apartheid government and, as such, bears primary responsibility for the rehabilitation and improvement of the lives of the people whom the claimants claim to represent.

7. The decision taken by Cabinet not to support the litigation was not taken lightly. The Cabinet only took this decision after an extensive discussion both at Cabinet committee level and in the full Cabinet in which I participated fully, The principal reason for the Cabinet's decision was that as the Mandela government in 1994 and the Mbeki government in 1999 were both elected by an overwhelming majority of the population, on a programme of thorough socio-economic transformation aimed at redressing the legacy of apartheid, it would make little sense for the government to support litigation, which not only sought to impose liability and damages on corporate South Africa but which, in effect, sought to set up the claimants as a surrogate government Accordingly, on 16 April 2003, the Cabinet, after extensive discussion of the matter at Cabinet committee level, resolved that:

> **"It remains the right of the government to define and finalise Issues of reparations, both nationally and Internationally. In this regard, it is Imperative for the government to clearly express its views on attempts to undermine South African sovereignty through actions—such as the reparations lawsuit filed In the United States of America by a US lawyer, Mr. Ed Fagan, against two South African mining firms and the participation of South African lawyers in such procedures."**

8.

8.1 The government's policy is to promote reconciliation with and business investment by all firms, South African and foreign, and we regard these lawsuits as inconsistent with that goal. Government's policies of reconstruction and development have largely depended on forging constructive business partnerships. Its 1996 Growth, Employment and Redistribution (**"Gear"**) strategy further acknowledged the importance of the private sector that faster economic growth offers the only way out of poverty, inequality, and unemployment, that such growth is driven by both foreign and local private sector investment, and. that government's principal role is to create an enabling environment for such investment. This market-friendly strategy regards business as the engine of economic growth.

8.2 The re-entry of South Africa to global capital and export markets post-1994, together with the government's exemplary fiscal and monetary policy record, have resulted in an increase in economic growth to 2.5% per annum from 1994-2002, compared. with the paltry below 1 per cent per annum growth of the previous decade. Importantly, private sector fixed investment has responded to the improved environment, rising some 4.3 per cent per annum since 1993.

8.3 The improved growth performance is still less than what is required to address successfully all the socio-economic legacies of apartheid—especially unemployment. But, together with the government's redirection of existing expenditure, it has enabled important progress to be made in addressing historical inequalities and poverty.

8.4 In addition to the government performance set out in 5, the recently released 2001 census, together with figures from the South African Reserve Bank, provide evidence of further important progress:

- real disposable income per capita of households (at constant 1995 prices) rose from R8 640 in 1994 to R9 271 in 2002, reflecting an increase of 7.3%;
- from April 1994 to February 2003, close on 1.5 million houses had either been built or were under construction with the help of the government's subsidy for low-income first-time buyers. The number of formal dwellings increased from 4.3 million in 1996 to 6.2 million in 2001, an increase of 44%. Further, formal houses constituted 48% of the total number of dwellings in 1996 and this proportion rose to 56% In 2001;
- the number of households using electricity for lighting increased from 5.2 million in 1995 to 7.8 million in 2001, an increase of 50%. While 57% of all households used electricity for lighting in 1996, this proportion had risen to 70% by 2001;
- the number of households with access to clean water increased from 7.2 million in 1996 to 9.5 million in 2001, an increase of 31%. As a result, by 2001 85% of all South African households had access to piped water within 200 metres of their homes;
- in 1996, the number of people aged between 5 and 24 who were studying at an educational institution was 11.8 million while in 2001 the number had risen to 13.7 million: an increase of 16%. The number of people aged 20 or over who have Grade 12 or have completed high school rose from 3.5 million in 1996 to 5.2 million in 2001, an increase of 50%.

9. The government accepts that corporate South Africa is already making a meaningful contribution to the broad national goal of rehabilitating the lives of those affeeted by apartheid. Over and above its existing corporate social investment programmes, business has been in partnership with the government in the R1-billion (approximately US $133-million) Business Trust. Over five years, this business led initiative has improved the lives of 2.5 million disadvantaged South Africans through focused programmes of human capacity building and employment creation. Further initiatives in partnership between business and government, as well as other social actors, are being prepared with concrete commitments having been made in a number of fields at the government's June 7, 2003 Growth and Development Summit attended by leading representatives of government, business and labour. At the summit, business agreed with government and labour to 'invest R145 billion (US$19 billion) in the automotive, chemical, mining and oil sectors over the next five years.

10. The remedies demanded in the current litigation in the United States—both the specific requests (such as for the creation of a historical commission and the institution of affirmative action programmes) and the demand for billions of dollars in damages to be distributed by the US courts—are inconsistent with Soutl. Africa's approach to achieving its long term goals. In this regard, I refer further to the earlier discussion on the TRC and its establishment in 3.2. As indicated above, the government has its own views on appropriate reparations policies and the appropriate allocation of resources to develop our economy. I would also make the point that matters of domestic policy which are pre-eminently South African should not be pre-empted by litigation in a foreign court.

11. It is also the view of the government that the issues raised in these proceedings are essentially political in nature. These should be and are being resolved through South Africa's own democratic processes. Another country's courts should not determine how ongoing political processes in South Africa should be resolved, not -least when these issues must be dealt with in South Africa. In addition, the continuation of these proceedings, which inevitably will include massive demands for documents and testimony from South Africans involved in various sides of the negotiated peace that ended apartheid, will intrude upon and disrupt our own efforts to achieve reconciliation and reconstruction.

12. Permitting this litigation to go forward will, in the government's view, discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals. Indeed, the litigation could have a destabilising effect on the South African economy as investment is not only a driver of growth, but also of employment. One of the structural features of the South African economy, and one of the terrible legacies of apartheid, is its high level of unemployment and its by-product, crime. Foreign direct investment is essential to address both these issues. If this litigation proceeds, far from promoting economic growth and employment and thus advantaging the previously disadvantaged, the litigation, by deterring foreign direct investment and undermining economic stability will do exactly the opposite of what it ostensibly sets out to do.

13. I understand that under United States law, courts may abstain from adjudicating cases in deference to the sovereign rights of foreign countries to legislate, adjudicate and otherwise resolve domestic issues without outside interference, particularly where the relevant government has expressed opposition to the actions proceeding in the

United States, and where. adjudication in the United States would interfere with the foreign sovereign's efforts to address matters in which it has the predominant interest. The government submits that its interest in addressing its apartheid past presents just such a situation.

I declare, under penalty of perjury, under the laws of the United States, that the foregoing is a true and correct statement.

Signed on 11th July 2003.

/s/ Penuell Mpapa Maduna
PENUELL MPAPA MADUNA

(28)

No. 03-339

Supreme Court, U.S.
FILED
FEB 26 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL AND FOREIGN LEGAL SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI

This Brief of *Amici Curiae* is respectfully submitted jointly by two groups: (1) United States scholars; and (2) foreign scholars.[1] Each of the scholars has studied or written extensively on subjects pertaining to international law, human rights law, or foreign affairs law.[2]

Amici believe that efforts to restrict the nature and scope of the Alien Tort Claims Act ("ATCA") conflict with the text of the statute, the historical record, and well-established case law. Since the seminal ruling of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), federal courts have applied the ATCA to impose civil liability for only the most serious violations of international law. For the past twenty-four years, federal courts have adopted a balanced interpretation and application of the ATCA. *Amici* support this nuanced approach to ATCA litigation.[3]

SUMMARY OF ARGUMENT

The Alien Tort Claims Act explicitly authorizes civil actions brought by aliens for torts committed in violation of the law of nations or a treaty of the United States. 28 U.S.C. § 1350. Courts construing the plain wording of the statute in

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[1] No counsel for either party authored the brief in whole or in part. No person or entity, other than *amici curiae*, its members, and counsel, made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this brief. Their consents have been filed with the Court.

[2] *Amici* consist of over 75 scholars from throughout the world, including Australia, Canada, Ireland, Mexico, the Netherlands, New Zealand, the United Kingdom, and the United States. A complete list of *amici* is located in the Appendix.

[3] *Amici* take no position on the other issues raised in this litigation.

its historical and doctrinal context have concluded that it provides subject matter jurisdiction and a cause of action for serious violations of international law, including human rights abuses.

The Petitioner and the Justice Department have sought to undermine this well-established understanding of the ATCA. First, they argue that the Alien Tort Claims Act is purely a jurisdictional statute. Second, they assert that U.S. courts may not consider unratified treaties or non-binding U.N. resolutions in construing the status of customary international law. Third, they allege that the ATCA cannot be applied extraterritorially. Finally, they suggest that ATCA litigation raises separation of powers concerns.

Taken together, these submissions offer no coherent vision of the ATCA. Indeed, the Justice Department's most recent analysis flatly contradicts the positions it expressed in *Filartiga v. Pena-Irala*, 630 F.2d at 876, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *National Coalition Gov't of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997).[4] In

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[4] The Justice Department Brief is at least the eighth filing since 1980 in which the Government has offered its interpretation of the ATCA. The United States has also filed briefs addressing the scope of the ATCA in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (supporting jurisdiction); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (opposing certiorari); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) (arguing that the ATCA does not provide jurisdiction over foreign sovereign); *Trajano. v. Marcos*, 978 F.2d 493 (9th Cir. 1992) (offering restrictive interpretation of the ATCA); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (supporting jurisdiction); *Alvarez-Machain v. Sosa*, 331 F.3d 604 (9th Cir. 2003) (*en banc*) (opposing jurisdiction); *Doe v. Exxon Mobil Corp.*, 1-01-CV-1357 (D.C. Cir. 2003) (opposing jurisdiction).

stark contrast, the judiciary has developed a coherent and consistent body of ATCA jurisprudence for twenty-four years.

The arguments set forth by the Petitioner and the Justice Department are unpersuasive; they contradict the express terms of the statute and do not comport with the historical record. They invite the courts to amend the statute without considering the views of Congress, which not only adopted the ATCA in 1789 but which extended it in the Torture Victim Protection Act of 1991. Additionally, they threaten to usurp the constitutional role of the courts to decide cases and controversies properly presented to them.

For these reasons, the Court should reject the arguments of the Petitioner and the Justice Department and affirm the long-recognized (and balanced) interpretation of the Alien Tort Claims Act.

ARGUMENT

I. THE ALIEN TORT CLAIMS ACT PROVIDES SUBJECT MATTER JURISDICTION AND A CAUSE OF ACTION FOR SERIOUS VIOLATIONS OF INTERNATIONAL LAW.

Enacted as part of the First Judiciary Act of 1789, the Alien Tort Act provides: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Since *Filartiga v. Pena-Irala*, the ATCA has been interpreted to establish subject matter jurisdiction and a cause of action for serious violations of international law, including violations of human rights norms.

A. This Approach is Consistent with the Language and History of the Alien Tort Claims Act.

By its terms, the ATCA covers lawsuits: (1) by an alien; (2) for a tort; (3) committed in violation of the law of nations or a treaty of the United States.[5] *See Estate of Rodriquez v. Drummond Company*, 256 F. Supp. 2d 1250, 1259-1260 (N.D. Ala. 2003); *Ge v. Peng*, 201 F. Supp. 2d 14, 19-20 (D.D.C. 2000); *Jama v. INS*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 at 238. The statute contains no additional reference to Congressional incorporation or to a case "arising under" federal law. *Cf.* 28 U.S.C. § 1331.

This was clearly understood by eighteenth-century courts, as suggested in the first reported case involving the ATCA.[6] In *Bolchos v. Darrel*, 3 Fed. Cas. 810 (D. S. Car. 1795), a French plaintiff sought restitution for the seizure and sale of slaves who had been taken from a captured Spanish prize vessel. Jurisdiction was premised on the ATCA. The court found that it had jurisdiction, dismissing "all doubt upon this point." *Id.* At no time did the court indicate that independent congressional authorization was necessary to allow the lawsuit to proceed.

This approach to the ATCA is also found in the opinions of the Attorney General. In 1795, Attorney General William Bradford addressed a situation in which American citizens trading off Sierra Leone were alleged to have joined

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[5] The term "law of nations" is now synonymous with international law. *See* Jordan Paust, *International Law as Law of the United States*, 63, 229-236, 311-312 (2d ed. 2003); M.W. Janis, "Jeremy Bentham and the Fashioning of 'International Law,'" 78 *Am. J. Int'l L.* 405 (1984).

[6] *See generally* Paust, *supra*, at 7-9, 233-234, 286-288, 391-392.

a French fleet in attacking and plundering British property on that coast. The opinion, only six years removed from the adoption of the First Judiciary Act, provides some insight into the contemporary understandings of the ATCA. After discussing the availability of criminal prosecution, the Attorney General addressed the ATCA.

> [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States; . . .

Breach of Neutrality, 1 *Op. Att'y Gen.* 57, 59 (1795) (emphasis in original). *See also Mexico Boundary – Diversion of the Rio Grande*, 26 *Op. Att'y Gen.* 250, 253 (1907) ("I repeat that the statutes thus provide a forum and a right of action."); *Abduction and Restitution of Slaves*, 1 *Op. Att'y Gen.* 29, 30 (1792) (apparent reference to a possible civil action under the ATCA where the defendant had committed piracy by stealing slaves from a French colony).

The reason for this uniformity of understanding regarding the ATCA is evident: the law of nations was considered a part of the common law. *See* Louis Henkin, "International Law as Law in the United States," 82 *Mich. L. Rev.* 1555 (1984); Edwin D. Dickinson, "The Law of Nations as Part of the National Law of the United States," 101 *U. Pa. L. Rev.* 26 (1952). Thus, "the First Congress understood that torts in violation of the law of nations would be cognizable at

common law, just as any other tort would be."[7] William S. Dodge, "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'," 19 *Hastings Int'l & Comp. L. Rev.* 221, 239 (1996). In cases alleging violations of the law of nations, the courts of the fledgling nation should be open to aliens seeking a remedy.[8]

Thus, the arguments raised by the Petitioner and the Justice Department, that the ATCA requires explicit statutory authorization and an express right of action to implement its provisions, are contrary to the historical record. Indeed, these additional requirements would necessarily defeat the application of the law of nations in domestic courts by erecting a test that no case can pass, thus rendering the ATCA

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[7] *See also* Paust, *supra*, at 14-15, 229-236, 311-312; Anthony D'Amato, "Judge Bork's Concept of the Law of Nations is Seriously Mistaken," 79 *Am. J. Int'l L.* 92 (1985).

[8] In 1790, Chief Justice John Jay made this point in a grand jury charge:

> We had become a Nation – as such we were responsible to others for the observance of the Laws of Nations; and as our national Concerns were to be regulated by national Laws [,] national Tribunals became necessary for the Interpretation & Execution *of them both*.

"John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York, April 12, 1790," in 2 *The Documentary History of the Supreme Court of the United States, 1789-1800* 25, 27 (Maeva Marcus, ed. 1988) (emphasis added). *See generally* Anthony D'Amato, "The Alien Tort Statute and the Founding of the Constitution," 82 *Am. J. Int'l L.* 62 (1988); Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor," 83 *Am. J. Int'l L.* 461 (1989).

meaningless.[9]

In addition, the Petitioner's position rests on a self-serving anachronism. The concept of a "cause of action" only "became a legal term of art when the New York Code of Procedure of 1848 abolished the distinction between actions at law and suits in equity and simply required a plaintiff to include in his complaint '[a] statement of the facts constituting the cause of action.'" *Davis v. Passman*, 442 U.S. 228, 237 (1979). Thus, the Petitioner apparently believes that the ATCA lay dormant from the day of its passage in 1789 until sometime in the nineteenth century when it suddenly sprang into meaning with the arrival of the cause of action concept.[10]

Every court that has considered the issue found that the ATCA establishes subject matter jurisdiction and a cause of action. In *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), for example, the Ninth Circuit explicitly held that the ATCA provides both subject matter jurisdiction and a cause of action. Its opinion

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[9] As noted by the court in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987), *reconsidered on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988):

> It is unnecessary that plaintiffs establish the existence of an independent, express right of action, since the law of nations clearly does not create or define civil actions, and to require such an explicit grant under international law would effectively nullify that portion of the statute which confers jurisdiction over tort suits involving the law of nations.

[10] This "rather late arrival of the term [cause of action] upon the legal scene raises at least a question when it is applied to interpret the alien tort statute . . . ." D'Amato, *supra*, at 95 (citation omitted); Paust, *supra*, at 224-236.

carefully examined the ATCA and distinguished it from other jurisdictional statutes:

> [I]n contrast to section 1331, "which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action." *Tel-Oren v. Libyan Arab Republic*, [726 F.2d 774, 779] (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). It is unnecessary that international law provide a *specific* right to sue. International law "does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions." *Id.* at 777-78 (quoting Louis Henkin, *Foreign Affairs and the Constitution* 224 (1972). "Nothing more than a *violation* of the law of nations is required to invoke section 1350." *Id.* at 779.

Id. at 1475. *See also Trajano v. Marcos*, 978 F.2d 493 (emphasis in original).

The federal courts have consistently supported this interpretation of the ATCA. *See, e.g., Estate of Rodriquez v. Drummond Company*, 256 F. Supp.2d at 1250 (N.D. Ala. 2003) ("[T]he ATCA 'creates both subject matter jurisdiction and a private right of action'"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003) ("ATCA provides a cause of action in tort for breaches

of international law"), *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (rejecting contention that ATCA only provides jurisdiction); *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1365 (S.D. Fla. 2001) (ATCA provides a cause of action to aliens for violations of international law); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 441 (D.N.J. 1999) ("[T]he ATCA provides both subject matter jurisdiction and a private right of action for violations of the law of nations."); *Jama v. I.N.S.*, 22 F. Supp. 2d at 363 (ATCA provides both jurisdiction and a cause of action); *Abebe-Jira v. Negewo*, 72 F.3d 844 at 848 ("[T]he Alien Tort Claims Act confers both a forum and a private right of action to aliens alleging a violation of international law."); *Kadic v. Karadzic*, 70 F.3d at 241 (ATCA provides jurisdiction and a cause of action); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) ("The plain language of the [ATCA] and the use of the words 'committed in violation' strongly implies that a well pled tort[,] if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action]"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995) (ATCA "yields both a jurisdictional grant and a private right to sue for tortious violations of international law . . . ."); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988) ("[T]he Alien Tort Statute provides a cause of action for 'international torts,' . . . .").

In contrast, only two judges (not courts) have challenged this mainstream view of the ATCA. In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), the D.C. Circuit dismissed an ATCA lawsuit in a *per curiam* decision, with each judge issuing

separate concurring opinions.[11] Judge Robb declined jurisdiction on the grounds that the court was presented with a non-justiciable political question.[12] Judge Edwards proclaimed his adherence to the legal principles established in *Filartiga* but distinguished that case on factual grounds. Judge Bork took a determinedly different approach. He stated that the ATCA was merely a jurisdictional statute and could not be considered a grant of a cause of action.[13]

In *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), the D.C. Circuit dismissed a *habeas corpus* action on jurisdictional grounds. The court also dismissed additional claims filed under the ATCA. While Judge Randolph issued a concurring opinion seeking to resurrect Judge Bork's view on the ATCA, the other members of the panel found the issue irrelevant and declined to consider it.

Judges Bork and Randolph are forceful advocates of judicial abnegation in this area, but their views do not reflect

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[11] Given the fractured nature of the opinion, the Justice Department has previously referred to *Tel-Oren* as having "little, if any, precedential value." Brief of the United States as Amicus Curiae Filed in Opposition to Petition for Certiorari, *Tel-Oren v. Libyan Arab Republic*, No. 83-2052 (January 1985), at 9. Even Judge Bork himself admitted that the divisions within *Tel-Oren* made "it . . . impossible to say even what the law of this circuit is." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 823 (Bork, J., concurring).

[12] Inexplicably, Judge Robb never cited *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court's leading decision on the political question doctrine.

[13] Not a single court has embraced Judge Bork's argument in *Tel-Oren*. Even district courts within the D.C. Circuit have declined to follow Judge Bork's approach to the ATCA. *See, e.g., Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3 (D.D.C. 1998).

established principles of law. To date, not a single federal court has accepted this restrictive interpretation of the First Judiciary Act.

B. This Approach is Consistent with the United States Government's Prior Interpretations of the Alien Tort Claims Act.

The Petitioner's brief and the Justice Department's most recent filing mark a striking departure from the United States Government's previous comments and submissions concerning the nature and scope of the Alien Tort Claims Act.

In 2000, for example, the State Department declared to the U.N. Committee against Torture that:

> U.S. law provides *statutory rights of action* for civil damages for acts of torture occurring outside the United States. One statutory basis for such suits, the Alien Tort Claims Act . . . represents an early effort to provide a judicial remedy to individuals whose rights have been violated under international law.

U.N. Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at para. 277 (emphasis added). In 1996, the State Department declared in its submission to the U.N. Commission on Human Rights that the "statute was originally enacted to provide *a remedy to individuals* who suffered a 'tort' at the hands of privateers seeking prize money under the law of admiralty. More recently, it has been applied to cases of human rights violations." U.N. Commission on Human Rights, Question of the Human

Rights of All Persons Subjected to Any Form of Detention or Imprisonment, U.N. Doc. E/CN.4/1996/29/Add.2 (1996), at para. 15 (emphasis added). Both these statements represent the official position of the United States Government in its dealings with the international community.

The State Department interpretation of the ATCA is not unique. The Justice Department has taken a similar approach in ATCA litigation. In *Filartiga v. Pena-Irala*, for example, the Justice Department noted that some violations of international law are judicially cognizable as torts "within the meaning of Section 1350."[14] *See* Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, (2d Cir. 1980), *reprinted in* 19 *Int'l Legal Materials* 585, 601-602 (1980). Indeed, the Justice Department indicated that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." *Id.* at 604. *See also* Statement of Interest of the United States, *Kadic v. Karadzic*, No. 94-9035 (2d Cir. 1995) (affirming the ATCA and the *Filartiga* litigation).

C. This Approach is Consistent with the Torture Victim Protection Act of 1991.

The Torture Victim Protection Act of 1991 ("TVPA"), which allows victims of torture and summary execution to sue

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[14] In its *Filartiga* submission, the Justice Department also dismissed challenges to the constitutionality of the ATCA. "Customary international law is federal law, to be enunciated authoritatively by the federal courts. An action for tort under international law is therefore a case 'arising under . . . the laws of the United States' within Article III of the Constitution." Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, (2d Cir. 1980), *reprinted in* 19 *Int'l Legal Materials* 585, 606 (1980).

the perpetrators of such atrocities, supports this approach to the Alien Tort Claims Act. 28 U.S.C. § 1350 note.

The TVPA was first introduced in 1986. In submitting the bill to the Senate, Senator Arlen Spector stated:

> The landmark case of *Filartiga v. Pena-Irala* confirmed that official torture is in fact a violation of the law of nations. . . . In holding that the court had jurisdiction over this suit, Judge Irving Kauffman [sic] reviewed the accepted sources of international law – the usage of nations, judicial opinions and the works of jurists – and concluded that official torture of both aliens and citizens violates the law of nations and raises a cause of action for damages under the Alien Tort Claims Act, 28 U.S.C. Section 1350. . . . Since that holding, several recent decisions have questioned whether this statute provides a clear basis for future suits in U.S. federal courts. In *Tel-Oren v. Libyan Arab Republic*, for example, judges dismissed an action brought under Section 1350 and noted the lack of clear congressional guidance on the subject. . . . The legislation I am introducing today . . . seeks to clarify this area of law.

132 *Cong. Rec.* S 7062 (June 6, 1986) (citations omitted).

Five years later, the bill was reintroduced in Congress. The House and Senate reports on the TVPA described the *Filartiga* opinion, which met with congressional approval, and the *Tel-Oren* opinion, which did not. According to the House Report:

[In *Tel-Oren*,] Judge Bork questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit and preferably contemporary grant by Congress of a private right of action before U.S. courts could consider cases likely to impact on foreign relations. . . . The TVPA would provide such a grant, and would also enhance the remedy *already available* under section 1350 in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

H.R. Rep. No. 367, 102d Cong., 1st Sess., pt. 1, at 4 (1991) (emphasis added). The Senate Report contained similar language of support for the ATCA and the *Filartiga* precedent. *See* S.Rep. No. 249, 102d Cong., 1st Sess., at 3 (1991) ("The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 . . . . Section 1350 has

other important uses and should not be replaced.").

In sum, Congress has considered the nature and scope of the ATCA and the *Filartiga* precedent and has affirmed their status through the adoption of the Torture Victim Protection Act.[15] *See Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, 104 (2d Cir. 2000); *Abebe-Jira v. Negewo*, 72 F.3d at 848; *Hilao v. Marcos*, 25 F.3d at 1475-1476.

The Petitioner and the Justice Department argue that it is the intent of the enacting Congress, and not a subsequent Congress, that controls the scope and meaning of the ATCA. Petitioner's Brief, at 44; Justice Department's Brief, at 27. According to their position, the legislative history of the TVPA is "entitled to no weight." Justice Department Brief, at 27. This approach, however, disregards established principles of statutory interpretation.

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination necessarily assumes that the implications of a

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[15] While the TVPA affirms and extends the *Filartiga* precedent, it does not appear that any bill has ever been introduced in Congress seeking to limit the nature and scope of the ATCA. Such congressional silence should also be considered by this Court. *Cf. American Insurance Association v. Garamendi*, 123 S. Ct. 2374, 2394 (2003) ("Indeed, it is worth noting that Congress has done nothing to express disapproval of the President's policy. Legislation along the lines of HVIRA has been introduced in Congress repeatedly, but none of the bills has come close to making it into law.").

> statute may be altered by the implications of a later statute." [citation omitted] This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.

Food and Drug Administration v. Brown & Williamson, 529 U.S. 120, 143 (2000). As a related statutory enactment, the TVPA sheds light on the ATCA and should be considered by this Court.

Finally, the Petitioner argues that the TVPA supports its position because if the ATCA "already granted aliens the right to sue for *all* tortious violations of binding international legal norms, then Congress did not need to create an express cause of action for aliens that covers a very narrow category of such violations." Petitioner's Brief, at 44 (emphasis in original). This argument fails to recognize a significant difference between the ATCA and the TVPA – the ATCA is limited to aliens whereas the TVPA applies to all individuals, including U.S. citizens.[16]

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[16] *See also* U.N. Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at para. 281 ("The remedies available under the Alien Tort Claims Act have been supplemented by the 1992 Torture Victims Protection Act. [citation omitted] While the Alien Tort Claims Act only provides a remedy to foreign nationals, the 1992 Torture Victims Protection Act allows both foreign nationals and United States citizens to claim damages against any individual who engages in torture or extrajudicial killing . . . .").

II. THE ALIEN TORT CLAIMS ACT DOES NOT ENFORCE UNRATIFIED TREATIES OR NON-BINDING U.N. RESOLUTIONS.

By its terms, the ATCA requires federal courts to determine the content of international law. While this requires courts to carefully examine the status of international law, it does not allow courts to create law out of unratified treaties or non-binding U.N. resolutions. Petitioner's Brief, at 45; Justice Department's Brief, at 28. Rather, these sources are consulted because they offer evidence of international law.[17]

Customary international law arises out of a consistent state practice recognized out of a sense of legal obligation (*opinio juris*). Evidence of both the objective element and the subjective element can take many forms, so long as it reflects state practice and a sense of legal obligation. *See, e.g., Restatement (Third) of the Foreign Relations Law of the United States* § 102(2) (1987). *See also United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *The Nereide*, 13 U.S. (9 Cranch) 388 (1815). The Supreme Court has identified the sources that courts should consult for evidence of customary international law: "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . ." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

In *Filartiga*, for example, the Second Circuit concluded that torture was a violation of customary international law by

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[17] By enacting the ATCA as a means for determining what claims are cognizable before the courts, Congress chose to exercise its power to incorporate international law by reference. *See* Paust, *supra*, at 12-14, 64-65, 391. *See also United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-162 (1820).

reviewing several sources – multilateral and regional treaties, a draft convention prohibiting torture, domestic laws of several countries, resolutions of international organizations, and the writings of publicists. *Filartiga*, 630 F.2d at 882-84. In its own submission in *Filartiga*, the Justice Department used the same sources to conclude that customary international law prohibited torture. These sources were consulted because cumulatively they provided evidence that torture was a violation of international law.[18]

To date, the federal courts have engaged in a careful and measured analysis of the individual claims raised in ATCA cases, accepting only well-established, universally recognized norms of international law.[19] Contrary to Petitioner's assertions, the federal courts have functioned as effective gatekeepers in ATCA cases, allowing only claims that are well-established under customary international law (and

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[18] In *Kadic v. Karadzic*, the Justice Department referenced a variety of sources, including non-self-executing treaties because "they are probative of the content of the law of nations." Statement of Interest of the United States, *Kadic v. Karadzic*, No. 94-9035, at 16 (2d Cir. 1995).

[19] The federal courts have also dismissed claims involving well-established, universally recognized norms of international law when the pleadings fail to support the essential elements of the claim. *See, e.g., Estate of Rodriquez v. Drummond Company*, 256 F. Supp. 2d 1250, 1261 (N.D. Al. 2003) (genocide claim unavailable where plaintiffs failed to allege that persecution was due to national, ethnical, racial, or religious reasons); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 168 (5th Cir. 1999) (genocide claim unavailable when pleadings "are devoid of discernable means to define or identify conduct that constitutes a violation of international law").

recognized by the United States) to proceed.[20]

For example, courts have recognized the viability of ATCA suits for such claims as: **genocide** - *Kadic v. Karadzic*, 70 F.3d at 232; *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d at 289; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Mushikiwabo v. Barayagwiza*, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. 1996); **summary execution** - *Estate of Rodriquez v. Drummond Company*, 256 F. Supp. 2d at 1250; *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp.2d at 1345; *Wiwa v. Royal Dutch Petroleum Company*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002); *Xuncax v. Gramajo*, 886 F. Supp. at 162; *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), *reconsidered on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988); **torture** - *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d at 289; *Wiwa v. Royal Dutch Petroleum Company*, 2002 U.S. Dist. LEXIS at 3293; *Tachiona v. Mugabe*, 234 F. Supp. 2d at 401; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1322; *Abebe-Jira v. Negewo*, 72 F.3d at 844; *Kadic v. Karadzic*, 70 F.3d at 232; *Xuncax v. Gramajo*, 886 F. Supp. at 162; *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997); *Hilao v. Estate of Marcos*, 25 F.3d at 1467; *Paul v. Avril*, 901 F. Supp. 330 (S.D.Fla. 1994);

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[20] The Petitioner cites three cases in support of his argument expressing concern with the range of putative offenses that could give rise to ATCA litigation. Petitioner's Brief, at 45. *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983). Petitioner fails to note, however, that each case was dismissed. Indeed, the Second Circuit imposed double costs on the appellant and her attorney in *Zapata* because of the vexatious nature of the lawsuit, further evidencing the ability of the courts to manage such litigation.

Trajano v. Marcos, 978 F.2d at 493; *Forti v. Suarez-Mason*, 672 F. Supp. at 1531. Similar findings have been made with respect to war crimes, including rape and other forms of sexual violence, slavery and forced labor, forced disappearance, and crimes against humanity. The United States has never argued, nor could it, that such acts do not constitute violations of the law of nations.

At the same time, federal courts have firmly rejected claims that they believe are not based on well-established norms of customary international law. At present, these claims include: **environmental harms** - *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1160-1161 (C.D. Cal. 2002); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Aguinda v. Texaco, Inc.*, 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. 1994); **censorship** - *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986); **commercial torts** - *De Wit v. KLM Royal Dutch Airlines*, 570 F. Supp. 613, 618 (S.D.N.Y. 1983); *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1347 (S.D.N.Y. 1982); **conversion** - *Cohen v. Hartman*, 634 F.2d 318, 320 (5th Cir. 1981); **fraud** - *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995); *Tamari v. Bache & Co. S.A.L.*, 730 F.2d 1103, 1104 (7th Cir. 1984); **negligence resulting in personal injury or death** - *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 348 (S.D. Tex. 1989); *Shanker Hedge v. British Airways*, 1982 U.S. Dist. LEXIS 16469 (N.D. Ill. 1982).

As rightly noted, "courts must proceed with extraordinary care and restraint" when determining the status of customary international law. *Flores v. Southern Peru Copper Corp.*, 343 F.3d at 154. To date, the courts have

heeded this admonition.[21]

Ultimately, the Petitioner and the Justice Department seek to limit actionable wrongs under the ATCA to violations of self-executing treaties that have been signed and ratified by the United States and which explicitly create a right of action. To do so, however, would deprive the ATCA of any force because the "law of nations" component would never apply and the "treaty of the United States" component would only apply to claims already within the scope of 28 U.S.C. § 1331. But only Congress can rewrite the statute in such a fundamental way.

III. ALIEN TORT CLAIMS ACT LITIGATION IS NOT BARRED BY THE GENERAL PRESUMPTION AGAINST THE EXTRATERRITORIAL APPLICATION OF FEDERAL STATUTES.

The Petitioner and the Justice Department assert that the ATCA cannot be applied to extraterritorial acts and urge the Court to graft a territorial requirement onto the ATCA. Petitioner's Brief, at 37; Justice Department's Brief, at 54-57. Respectfully, the Court should decline this invitation to do so.[22]

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[21] *See also United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (engaging in a careful and measured analysis of customary international law).

[22] The Petitioner and the Justice Department conflate a sufficient condition for ATCA jurisdiction with a necessary one. If an alien were injured by a tortious violation of international law in the United States, subject matter jurisdiction under the ATCA would be established. *See, e.g., Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793). But it hardly follows that territoriality is a precondition for all exercises of jurisdiction under the ATCA.

As a preliminary matter, the historical record does not support this approach to the ATCA. For example, Attorney General Bradford noted in 1795 that British citizens injured in a French raid on a British colony "have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States." 1 *Op. Att'y Gen.* at 59. At no time did the Attorney General identify a locus requirement as a necessary condition for ATCA litigation.

The basic error in calling for a locus requirement is that it fails to recognize the transitory nature of torts. The Framers understood that civil actions sounding in tort were considered transitory because the tortfeasor's wrongful act created an obligation that could follow him or her across national boundaries.[23] This understanding of tort was also well-recognized in the early case law of the Supreme Court.

> [T]he courts in England have been open in cases of trespass other than trespass upon real property, to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespass committed within the realm and out of the realm, or within or without the king's foreign dominions.

McKenna v. Fisk, 42 U.S. 241, 248 (1843). Indeed, the transitory nature of torts reflects the general acceptance that

[23] *See Cheshire's Private International Law*, 257-261 (8th ed. 1970); *Watts v. Thomas*, 5 Ky. (2 Bibb) 458 (1811); *Stout v. Wood*, 1 Blackf. 71 (Ind. Circ. Ct. 1820); *Mostyn v. Fabrigas*, 1 Cowp. 161 (K.B. 1774).

"a state or nation has a legitimate interest in the orderly resolution of disputes within its borders." *Filartiga*, 630 F.2d at 885.

One reason that the drafters of the First Judiciary Act sought federal review of transitory torts involving claims of international law was to ensure uniformity in matters pertaining to foreign affairs. According to the Justice Department in its *Filartiga* submission, the ATCA "is one of several provisions of the Judiciary Act 'reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions.'" Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 19 *Int'l Legal Materials* at 588 (*quoting Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964).

There is another reason to suggest that the drafters of the First Judiciary Act intended for the ATCA to regulate transitory torts that raised international concerns. Considered in its historical context, the ATCA was a direct and natural "response to what the Founders understood to be the nation's duty to propagate and enforce those international law rules that directly regulated individual conduct." Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor," 83 *Am. J. Int'l L.* 461, 475 (1989).

It is certainly not fatal to ATCA litigation that international norms have evolved since 1789 and now regulate such acts as torture, slavery, or genocide.[24] By its

[24] *See United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) ("It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the

nature (and like the common law), international law is evolutionary.[25] Although "[t]he Framers might not have anticipated the fact that the law of nations would come to prohibit one alien from torturing another, . . . it is unrealistic to think that they would have wanted the federal courts to shrink from enforcing the law of nations 'in its modern state of purity and refinement.'" William Dodge, "The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context," 42 *Va. J. Int'l L.* 687, 701 (2002). *See also* Burley, *supra*, at 482 (ATCA was adopted as "a moral imperative – a matter of national honor."). As several courts have properly observed, "[b]ecause of the nature of the alleged acts, the United States has a substantial interest in affording alleged victims of

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principle can be considered as incorporated into the public code of nations."). *See also The Paquete Habana*, 175 U.S. 677 (chronicling the development of the law of nations); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (distinguishing between "ancient" and "modern" law of nations). "Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Filartiga*, 630 F.2d at 881.

[25] This was the position of the Justice Department in the *Filartiga* litigation. "The law of nations in Section 1350 refers to the law of nations as that body of law may evolve. There is no reason to believe that Congress intended to freeze the meaning of the law of nations in this statute as of 1789, any more than it intended the simultaneous grant of jurisdiction over maritime actions to be limited to maritime law as it then existed. Since the law of nations had developed in large measure by reference to evolving customary practice, the framers of the first Judiciary Act surely anticipated that international law would not be static after 1789." Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 19 *Int'l Legal Materials* at 588.

atrocities a method to vindicate their rights."[26] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d at 340.

It is not surprising, therefore, that efforts to add a locus requirement to the ATCA have been explicitly rejected by the courts. *See, e.g., Trajano v. Marcos*, 978 F.2d at 500 ("We are constrained by what § 1350 shows on its face: no limitations as to the citizenship of the defendant or the locus of the injury").

IV. ALIEN TORT CLAIMS ACT LITIGATION SHOULD NOT BE PRESUMPTIVELY BARRED BY ALLEGED "SEPARATION OF POWERS CONCERNS."

Both the Petitioner and the Justice Department argue that ATCA cases inherently pose separation of powers concerns. Petitioner's Brief, at 8; Justice Department's Brief, at 46. In support of this assertion, they allege that ATCA litigation will create tensions with other nations and

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[26] *See also* Testimony of Abraham Sofaer, the State Department's Legal Adviser, with respect to the Convention against Torture.

> The Administration . . . believes . . . that, as a member of the international community, we must stand with other nations in pledging to bring to justice those who engaged in torture, *whether in U.S. territory or in the territory of other countries.*

U.N. Convention on Torture, Hearings before the Committee on Foreign Relations, U.S. Senate, 100th Cong., 2d Sess. (Jan. 30, 1990), at 8 (emphasis added).

undermine the war on terrorism.[27] Their arguments suggest that courts are incapable of regulating ATCA litigation and that a permanent barrier is needed to deter these lawsuits.

Despite such broad assertions, it is inaccurate to suggest that the federal courts cannot protect the United States from abusive litigation. The courts have developed several doctrines of judicial abstention to ensure respect for separation of powers, including the political question doctrine, the act of state doctrine, and the doctrine of *forum non conveniens*. Other judicial doctrines – from standing requirements to statutes of limitations – also impose rigorous requirements on ATCA litigation. But these doctrines require the courts to consider them on a case-by-case basis.[28]

For example, the political question doctrine constitutes one form of judicial abstention that allows courts to protect the separation of powers. *Baker v. Carr*, 369 U.S. 186, 217 (1962). *See, e.g., Anderman v. Federal Republic of Austria*, 256 F. Supp.2d 1098 (C.D. Cal. 2003) (dismissal pursuant to political question doctrine). The act of state doctrine serves

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[27] In support of its assertion that ATCA cases could have serious implications for the current war on terrorism, Justice Department cites *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003). Justice Department's Brief, at 52-53. But it is unclear how *Al Odah* could possibly be viewed as having "serious implications for our current war on terrorism," especially when the case was dismissed by the D.C. Circuit Court of Appeals. If anything, *Al Odah* confirms that the federal courts are fully capable of dismissing ATCA claims if these cases do not meet the exacting standards of the statute. *Al Odah*'s connection to the ATCA is unclear in any event, since two members of the three-judge panel concluded that the ATCA was irrelevant to the case.

[28] *See* Jeffrey M. Blum & Ralph G. Steinhardt, "Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After *Filartiga v. Pena-Irala*," 22 *Harv. Int'l L.J.* 53 (1981).

a related function, precluding courts "from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory . . . ." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). *See, e.g., Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d at 1116 (dismissal pursuant to act of state doctrine). The doctrine of *forum non conveniens* provides yet another form of judicial abstention that allows the federal courts to dismiss lawsuits that are more properly litigated in a foreign jurisdiction. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). *See, e.g., Aguinda v. Texaco, Inc.*, 303 F.3d at 470 (dismissal pursuant to doctrine of *forum non conveniens*).

The Petitioner and Justice Department appear to disregard these judicial doctrines when they imply that the federal courts are incapable of addressing separation of powers concerns in ATCA litigation. But overbroad concerns such as these have been dismissed by this Court before.

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Baker v. Carr, 369 U.S. at 211-212. *See also Japan Whaling*

Association v. American Cetacean Society, 478 U.S. 221, 230 (1986) ("Under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and [it] cannot shirk this responsibility merely because our decision may have significant political overtones."). And as this Court noted in *W.S. Kirkpatrick v. Environmental Tectonics*, 493 U.S. 400, 409 (1990), courts "[h]ave the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."

In short, "[t]here is, then, no Supreme Court precedent for extraordinary abstention from judicial review in foreign affairs cases." Louis Henkin, *Foreign Affairs and the U.S. Constitution* 146 (2d ed. 1996). Rather, ATCA lawsuits should be considered on a case-by-case basis.[29] "We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign

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[29] In its *Filartiga* submission, the Justice Department acknowledged that courts in ATCA litigation must engage in a careful analysis of the underlying international norms before allowing such lawsuits to proceed.

> [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. [citation omitted] When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts.

Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 19 *Int'l Legal Materials* at 604.

affairs." *Kadic v. Karadzic*, 70 F.3d at 249.

The final irony is that the Petitioner and Justice Department suggest that ATCA litigation would undermine the war on terrorism and the fight against international crime. But the opposite is true: it is precisely through civil litigation that victims of international crimes, including terrorism, can seek compensation for their injuries and punish perpetrators of these atrocities.[30] It would be wrong to create blanket immunity for defendants accused of such horrific acts and, in the process, to take away the one (and perhaps only) weapon available to victims of serious human rights abuses.

CONCLUSION

The Alien Tort Claims Act plays a critical role in upholding fundamental principles of international law and has done so for almost a quarter-century. It provides victims of serious human rights abuses – from slavery and genocide to torture and terrorism – with the ability to seek redress for their injuries in U.S. courts.

The Petitioner and the Justice Department should not be allowed to eviscerate a statute that has been affirmed by the three branches of government on numerous occasions. To do so would cause further injury to victims of serious human rights abuses and would send the wrong message to perpetrators of such egregious acts.

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[30] *Cf.* The Anti-Terrorist Act of 1990, 18 U.S.C. § 2333.

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(18)

No. 03-339

FEB 27 2004

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE CAREER FOREIGN SERVICE DIPLOMATS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The purpose of this brief is to bring to this Court's attention the views and experience of career United States diplomats relevant to the arguments made by petitioners and their *amici* about the impact of the Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA") on U.S. foreign policy.

Each of the amici curiae has served in the U.S. Foreign Service. Most have served as ambassadors.

Hon. James Akins served in the Foreign Service for 22 years, primarily in the Middle East, including as the U.S. Ambassador to Saudi Arabia during the Nixon Administration (1973-75) and as an attache in the U.S. Embassy in Baghdad (1963-65). He is a respected and highly sought speaker and analyst on the Middle East peace process as well as Arab politics in general.

Hon. Jack R. Binns served in a variety of posts in his 25 years in the Foreign Service, including Director, Northern European Affairs, Political Counselor in the United Kingdom, Deputy Chief of Mission in Costa Rica and Spain, and Ambassador to Honduras. He now resides in Arizona, and is president of the Tucson Committee on Foreign Relations and a visiting scholar at the University of Arizona.

Eugene Bird served in the Foreign Service for 22 years (1952-75), including in Israel, Egypt, Lebanon, Saudi Arabia and India. He worked extensively with chambers

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1. No counsel for a party authored this brief in whole or in part and no person or entity other than the *amici curiae* or their counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of the brief of *amici curiae* and their letters of consent have been lodged with the Court.

of commerce in each of those countries. He was the co-founder of the Indo-U.S. Chamber of Commerce, Trade Adviser to the Northwestern Governors (1975-78), and Vice-President of General Electric overseas, based in the Middle East (1978-82).

Harry C. Blaney III served in the Foreign Service for 25 years, including as a Member of the Secretary of State's Policy Planning Staff and as Director of the Office of Asian Refugee Assistance at the Department of State. He also was a Visiting Fellow at the Council on Foreign Relations and at the Royal Institute of International Affairs and the Woodrow Wilson International Center for Scholars. He served abroad at the U.S. Mission to the European Communities and at the U.S. Mission to NATO.

Larry G. Butcher was a member of the Foreign Service from 1970 until his retirement in 1998 as a Senior Foreign Service officer. He served as a commercial officer in Venezuela and an economic officer in Poland and Portugal. In the Office of Regional Economic Policy in the Bureau of Inter-American Affairs and in five years as Deputy Director (1989-1991) and Director (1993-1997) of the Office of Development Finance, he dealt with issues including human rights concerns and U.S. policy on loans to developing countries.

Suzanne S. Butcher was a member of the Foreign Service for 29 years, serving in Mexico, Venezuela, Poland and Canada. In the Office of Policy and Planning of the Bureau of Inter-American Affairs (1984-86), as Deputy Director of the Office of UN Political Affairs (1989-91), as a member of the Secretary's Policy Planning Council (1993-96), and as Director of the Office of Australia, New Zealand, and Pacific Island Affairs (1996-98), she dealt with the interplay of multiple U.S.

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Elizabeth Spiro Clark served in the Foreign Service in a variety of capacities including director of the office of democracy promotion in the Bureau of Democracy, Human Rights and Labor from 1995-1998, and the counselor for political affairs in the U.S. embassies in Iceland and Norway. She was a political officer in South Africa in the mid-1980s analyzing internal political developments for the U.S. government and assisting anti-apartheid movements through a congressionally mandated human rights fund. She held assignments in legislative affairs and as a special assistant for Europe and Africa to the Undersecretary for Political Affairs. She has received a number of reporting and other awards. She is currently an associate at the Institute for the Study of Diplomacy at Georgetown University.

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Hon. John Gunther Dean served as Ambassador to Cambodia (1974), Denmark (1975-1978), Lebanon (1978), Thailand (1981), and India (1985-1988). He was also Deputy for Civil Operations for Rural Development Support in Military Region 1 in Vietnam with the assimilated rank of Major General, and presented credentials as Charge d'Affaires in Mali. He is currently a member of academic and corporate boards in the United States, Europe and Asia.

Hon. Willard Ames De Pree served in the Foreign Service from 1956 to 1993. His overseas assignments included tours as Ambassador to Mozambique (1976-1980) and Bangladesh (1987-1990). In the State Department he served as Director of Management Operations, a member of the Policy Planning Staff and a Senior Inspector.

Hon. John Ferch served in the Foreign Service for 31 years. He entered the Foreign Service in 1958, serving in a variety of postings including economics officer in Colombia (1964-67), principal officer in Dominican Republic (1967-69), chief of the economic sections in El Salvador (1969-71) and Guatemala (1971-75), director, Office of Food Policies and Programs (1975-78), Chief of the U.S. Interest Section in Cuba (1982-1985) and Ambassador to Honduras (1985-86). In previous assignments he specialized in economic and American business matters. After the Foreign Service he was National Intelligence Officer for Economics at the Central Intelligence Agency and then Director of the Office of Foreign Relations at the Department of Labor.

F. Allen "Tex" Harris served for 35 years as a career Foreign Service Officer in a variety of postings including Political Officer in Caracas, Venezuela and Buenos Aires,

Argentina, Special Assistant to the Legal Advisor, Deputy Director of Southern Africa, Director of the SALT Working Group, Director of Public Programs, Director of Emergency Operations, Director of African Regional Affairs, Consul General in Durban, South Africa and Melbourne, Australia, Associate Administrator of the EPA for International Activities, and twice President of the American Foreign Service Association. He is also the recipient of the Department's Distinguished Honor Award for reporting on human rights violations in Argentina during the "dirty war" period. He retired in 1999, resides in Virginia and is currently a lecturer on foreign affairs and the Secretary of the American Foreign Service Association.

Hon. Robert V. Keeley spent 34 years as a career Foreign Service Officer, including in Jordan, Mali, and Greece, as Deputy Chief of Mission in Uganda and Cambodia, and as Ambassador to Mauritius, Zimbabwe, and Greece. He served as Deputy Assistant Secretary of State for Africa, and as Deputy Director of the Interagency Task Force for the Indochina Refugees. He retired in 1989 and served as President of the Middle East Institute in Washington from 1990 to 1995.

Brady Kiesling served as a Foreign Service Officer for 20 years, including in Israel, Morocco, Greece, and Armenia. His last position was as Political Counselor at the U.S. Embassy in Athens, where he had also served previously as human rights officer.

Hon. David Korn served in the Foreign Service for 32 years (1956-82), mostly in the middle East. He was the Ambassador to Togo (1986-88) and Permanent Chief of Mission to Ethiopia (1982-85, during which years the U.S. did not have an Ambassador to Ethiopia).

Hon. Princeton Lyman is the Ralphe Bunche Senior Fellow and Director of Africa Policy Studies at the Council on Foreign Relations. He was Assistant Secretary of State for International Organizations (1996-98), Ambassador to South Africa during that country's transition from apartheid to democracy (1992-95), Director of the State Department's Bureau for Refugee Programs (1989-92), and U.S. Ambassador to Nigeria (1986-89). In all, he served for over three decades in the U.S. Department of State and U.S. Agency for International Development. After completing his Foreign Service career, he was a senior fellow at the United States Institute of Peace (1999-2000) and Director of the Global Interdependence Initiative at the Aspen Institute (2000-03).

Hon. Richard Cavins Matheron served in the Foreign Service for 37 years (1949-1986), including as the U.S. Ambassador to Swaziland (1979-82).

Hon. John W. McDonald, lawyer and diplomat, spent twenty years of his career in Western Europe and the Middle East. From 1947-1974, Ambassador McDonald held various State Department assignments in Berlin, Frankfurt, Bonn, Paris, Washington D.C., Ankara, Tehran, Karachi, and Cairo. From 1978-87, he carried out a number of assignments for the State Department including President of the INTELSAT World Conference called to draft a treaty on privileges and immunities, Secretary General of the 27th Colombo Plan Ministerial Meeting, head of the U.S. Delegation which negotiated a UN Treaty Against the Taking of Hostages, and Coordinator for Multilateral Affairs of the State Department's Center for the Study of Foreign Affairs.

Edmund McWilliams served in the Foreign Service for 26 years (1975-2001) in a variety of postings including

Department of State desk officer for Laos/Cambodia and Vietnam, Political Officer in Bangkok and Moscow, Political Counselor in Managua and Jakarta, Acting Deputy Chief of Mission in Kabūl, Special Envoy to Afghanistan and Charge d'Affaires in Bishkek and Dushanbe. He received the Secretary of State's Secretary's Career Achievement Award, four Superior Honor Awards, two Group Superior Honor Awards, two Meritorious Honor Awards and the Christian A. Herter Award (American Foreign Service Association).

Hon. Donald Norland served in the Foreign Service from 1952 to 1981, including three years, 1976-79, concurrently as Ambassador to Botswana, Swaziland and Lesotho. He also served in Morocco (1952-56), Cote d'Ivoire (1958-60), Burkina Faso (1960) and Guinea (capital Conakry) 1970-72) and as Ambassador to Chad (1979-81). From 1987 to 1989, Ambassador Norland chaired the African Studies Program at the Foreign Service Institute, the State Department's in-house training center. His private sector experience includes Program Director at the Center for International Private Enterprise at the U.S. Chamber of Commerce, President of the WorldSpace Foundation and as a founding member of the Governing Boards of the New Africa Fund and the National Summit on Africa.

Hon. Edward L. Peck served in the Foreign Service for 32 years, including in Sweden, Morocco, Algeria, Tunisia and Egypt. He was Chief of Mission in Iraq and Mauritania; and Deputy Director of the Reagan White House Task Force on Terrorism. He was an army paratrooper who saw two tours of active duty, and is a Fellow of the Institute of Higher Defense Studies, National Defense University.

Hon. Jack R. Perry was a career Foreign Service Officer from 1959 to 1983, serving in Moscow, NATO, Paris, Prague, Stockholm and as Ambassador to Bulgaria 1979-81. After retirement he taught at The Citadel, Charleston, S.C., for three years, and from 1985 to 1995 was the director of the Dean Rusk Program in International Studies at Davidson College in Davidson, North Carolina, where he still resides.

William A. Root was employed by the Department of State from 1950 to 1983, most of that time as a Foreign Service Officer. He served in Bonn, Copenhagen, Saigon, Berlin, as well as Washington, D.C. He was Director of the Office of East-West Trade from 1976 to 1983.

Hon. Ronald I. Spiers served in the Foreign Service for 38 years (1954-92), including as Ambassador to the Commonwealth of the Bahamas (1973-74), Turkey (1977-80) and Pakistan (1981-83). He was Director of NATO affairs (1964-66), Assistant Secretary of State for Political-Military Affairs (1969-1973), Assistant Secretary of State for Intelligence & Research (1980-81), and Under-Secretary of State for Management (1983-89). Recipient of two Presidential Distinguished Executive Service Awards, he was accorded the personal rank of Career Ambassador by President Reagan and the U.S. Senate in 1984. In 1989, Ambassador Spiers was nominated by President Bush and appointed by UN Secretary General Perez de Cuellar as Under Secretary General of the UN for Political Affairs, making him the most senior American in the UN Secretariat, responsible for General Assembly affairs and for coordinating implementation of UN resolutions after the Gulf war. He retired from the UN in March 1992.

Hon. Robert White began his 25 year Foreign Service career in 1955. Among the posts he held were Latin America Director of the Peace Corps, Deputy Permanent Representative to the Organization of American States, Ambassador to Paraguay, and Ambassador to El Salvador. After retiring from the Foreign Service in 1981, he served as a Senior Associate at the Carnegie Endowment for International Peace and President of the Center for International Policy in 1989.

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SUMMARY OF ARGUMENT

Eliminating, or drastically curtailing, ATCA lawsuits is not justified by concerns over any overall negative impacts that the statute has on foreign policy. On the contrary, eviscerating ATCA could undermine U.S. foreign policy objectives.

The United States has long been regarded as a world leader in its commitment to international human rights standards and respect for the rule of law. This is one of our greatest assets in our diplomatic relations. Our commitment to the rule of law and to the punishment of those who commit gross violations of human rights standards has been a hallmark of our foreign policy. The credibility of that commitment will be undermined if we eliminate ATCA lawsuits, which are a highly visible tool to hold accountable persons who commit heinous acts such as genocide, crimes against humanity, war crimes, rape and torture.

U.S. foreign policy has many facets. Even where we criticize another government for its human rights practices, or where an ATCA claim is brought against one of its citizens or against a corporation doing business in that country, rarely do such actions have a significant adverse impact on our foreign relations. All of us have diplomatic experience in countries where we have engaged in such criticism, or concerning which ATCA claims have been brought. Yet bilateral diplomatic relations have continued, U.S. companies have continued to invest, and those countries have continued to cooperate on matters of mutual interest such as the war against terrorism.

U.S. trade and investment policy do not necessarily contradict our human rights policy. Our government has spoken clearly about the need to ensure that U.S. corporate entities comply with international human rights obligations. Similarly, in our war against terrorism, our policy is to maintain our commitment to human rights norms and the rule of law.

There may, of course, be particular cases where a claim under ATCA may be counterproductive to overall U.S. foreign policy goals, including the promotion and protection of human rights. However, in such cases the State Department is able to make its views clear. It has done so repeatedly. We have confidence in the capacity of the courts to weigh these considerations on a case-by-case basis and to dismiss cases where warranted.

ARGUMENT

I. ATCA IS CONSISTENT WITH THE U.S. FOREIGN POLICY PRIORITY OF PROMOTING RESPECT FOR INTERNATIONAL HUMAN RIGHTS.

The present Administration has described the central tenet of American foreign policy over the past 200 years as a "distinctly American internationalism that reflects the union of our values and our national interests."[2] The National Security Council continued, "in pursuit of our goals, our first imperative is to clarify what we stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere. . . . We will speak out honestly about violations of the nonnegotiable demands of human dignity."

The commitment to these "nonnegotiable demands of human dignity" is reflected in many aspects of U.S. policy. For nearly 30 years, this country has issued "Country Reports" on human rights practices. The State Department's Country Reports are unilateral mechanisms that became part of U.S. foreign policy under the Nixon Administration through an amendment to the Foreign Assistance Act of 1973.[3] These reports are a widely cited authority on human rights practices around the world.

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2. National Security Strategy of the United States of America (September 2002) available at *http://www.whitehouse.gov/nsc/nss.html*.

3. Michael E. Parmly, Acting Assistant Secretary of State, Bureau of Democracy, Human Rights, and Labor, Introduction: IV. History of the Human Rights Reports, U.S. Department of State Human Rights Report for 2000 available at http://www.state.gov/g/drl/rls/hrrpt/2000/648pf.htm; 22 U.S.C. § 2151n.

Our country conditions foreign aid on respect for human rights. Section 502B of the Foreign Assistance Act of 1961, which was adopted in 1974, declares the joint view of the Congress and the President that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[4]

Numerous U.S. laws accordingly condition foreign development, security and investment assistance and trade benefits on compliance with internationally recognized human rights.[5]

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4. 22 U.S.C. § 2304(a)(1).

5. *See, e.g.*, 7 U.S.C.A. § 1733(j)(1) (the United States "shall not enter into any agreement under this chapter to provide agricultural commodities . . . to the government of any country determined by the President to engage in a consistent pattern of gross violations of internationally recognized human rights"); 12 U.S.C.A. § 635(6)(D)(1) (The Export-Import Bank of the United States

> shall not give approval to guarantee or insure a sale of defense articles or services unless . . . the President determines . . . that the purchasing country has complied with all restrictions imposed by the United States on the end use of any defense articles or services . . . and has not used any such defense articles or services to engage in a consistent pattern of gross violations of internationally recognized human rights . . .

19 U.S.C.A. § 2434 (extending normal trade relations to former "Marxist-Leninist" countries that now comply with international human rights norms); 19 U.S.C.A. § 3901 (finding that U.S. implementation of sanctions on conflict diamonds was related to the human rights violations committed in Sierra Leone, Angola, and the Democratic Republic of Congo).

ATCA is one of the tools of the United States' overall efforts to promote compliance by government officials and private actors with fundamental standards of international human rights. U.S. courts have allowed cases to proceed only for the most serious of human rights violations involving gross physical abuse. Their rulings have been limited to violations such as torture, summary execution, genocide, war crimes, arbitrary detention, and disappearances.[6] These abuses have been widely condemned internationally and by U.S. foreign policy for decades. Particular ATCA cases, such as those against Bosnian Serb leader Radovan Karadzic, can serve to reinforce other aspects of U.S. foreign policy.[7]

By causing other nations to question our commitment to the enforcement of human rights standards, an effective elimination or evisceration of ATCA could undermine American foreign policy.

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6. *See, e.g.*, *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (disappearances, summary execution, torture and cruel, inhuman or degrading treatment); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (genocide and war crimes); *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1993) (torture, execution, and disappearance); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (torture).

7. Even critics of ATCA state that these cases have helped bring about important resolutions for human rights victims. For example, victims' lawsuits helped to make possible the historic agreement the United States forged in 2000 with the German government and companies to compensate Holocaust-era slave laborers. After negotiating that agreement, then Deputy Secretary of the Treasury Stuart Eizenstat said: "It was the American lawyers, through the lawsuits they brought in U.S. courts, who placed the long-forgotten wrongs by German companies during the Nazi era on the international agenda. . . . Without question, we would not be here without them." Remarks of Deputy Secretary of the Treasury Stuart E. Eizenstat at the 12th and Concluding Plenary on the German Foundation, LS-774 (July 17, 2000) available at http://www.ustreas.gov/press/releases/ls774.htm.

II. POTENTIAL CONFLICTS WITH OTHER ASPECTS OF U.S. FOREIGN POLICY DO NOT JUSTIFY DRASTICALLY CURTAILING ATCA.

ATCA was enacted "as part of an articulated scheme of federal control over external affairs . . . where principles of international law are in issue," and was designed to respond to "[t]he Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world."[8]

Cases brought in the United States by private parties need not limit the ability of the Executive Branch to engage with foreign governments. Other governments generally understand that private lawsuits are not U.S. government actions.

Other governments do on occasion object to aspects of our legal system. As diplomats it was our role to explain U.S. policy to the world, including how our government functions and our constitutional separation of powers. It fell to us to explain what may sometimes seem to other countries to be incomprehensible requirements of the U.S. legal system. National legal systems differ and at times conflict. Our task was to promote resolution of such disputes, which often arise from mutual misunderstanding. Mere differences in enforcement systems cannot by themselves justify eliminating a valuable means of human rights enforcement. In any event, ATCA has not caused any greater conflict than other laws to which some foreign nations may object.

8. *Filartiga v. Pena Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

III. THE EXECUTIVE BRANCH HAS SUPPORTED IMPORTANT ATCA CASES.

Our experience as diplomats leads us to concur in the support for prudent application of ATCA expressed by the State Department to federal courts in leading human rights cases.

In a joint *amicus* brief in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the State and Justice Departments successfully urged the U.S. Court of Appeals for the Second Circuit to apply international law norms under ATCA. "Such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance. Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government."[9]

They emphasized, moreover, that to fail to recognize a right of action by a victim of an accepted international human rights norm could harm U.S. foreign relations:

> [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. . . .When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might

9. Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 603 (1980) (citations omitted).

> seriously damage the credibility of our nation's commitment to the protection of human rights.[10]

Similarly, in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), the State Department Legal Adviser and the Solicitor General urged the Second Circuit to vacate and remand the jurisdictional dismissal of an ATCA suit against a nongovernmental actor. They argued that the lower court should have engaged in "a rigorous analysis of a range of factors in order to determine whether an action can be pursued under the Alien Tort Statute for a violation of the law of nations."[11] Their brief suggested that, as long as courts engage in such a rigorous analysis, separation of powers concerns need not arise.[12]

In 1992, the Torture Victim Protection Act ("TVPA"),[13] which expanded the possibility for suits in U.S. courts for violations of international human rights law, was enacted into law. In signing the TVPA into law, President George Bush acknowledged the "danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries," but explained:

> These potential dangers, however, do not concern the fundamental goals that this legislation seeks

10. *Id.* at 604.

11. Brief of United States as Amicus Curiae at 2, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069).

12. *See id.* at 1 (finding "no merit to the suggestion . . . that the justiciability of these cases is in doubt . . . because of the theoretical possibility" that "[the defendant] Karadzic might some day be recognized by the Executive Branch as a head of state.").

13. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).

> to advance. In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere.[14]

IV. DRASTIC CURTAILMENT OF ATCA IS NOT JUSTIFIED BECAUSE WELL-ESTABLISHED DOCTRINES ALLOW DISMISSAL OF CASES WHICH WOULD HARM U.S. FOREIGN RELATIONS.

There are times when a case brought under the Alien Tort Claims Act may damage U.S. foreign policy interests, including the promotion and protection of human rights. But U.S. courts have shown themselves to be respectful of these ramifications. We understand that there are a number of doctrines which federal courts have at their disposal, and which they have used to dispose of cases that are harmful to U.S. foreign policy.[15] These tools can effectively limit the

14. Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. Pres. Doc. 465 (March 12, 1992).

15. The "preferable approach" to analyzing justiciability under ATCA "is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in Section 1350, without compromising the primacy of the political branches in foreign affairs." *Kadic*, 70 F.3d at 249. Among other doctrinal tools, the "act of state doctrine" precludes courts "from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory" in the "absence of a treaty or other unambiguous agreement regarding controlling legal principles." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 421 (1964). Other tools include sovereign immunity under the Foreign Sovereign Immunities Act, and venue under the doctrine of *forum non conveniens*.

harm individual ATCA cases may cause and provide a further reason why the effective repeal of ATCA is not justified.

Courts may ask the U.S. State Department for its views on whether the Court should refrain from ruling on a case due to foreign policy considerations. We understand that this is a common practice in ATCA cases. As in the *Filartiga* and *Kadic* cases discussed above, the State Department has at times stated that there would be no negative foreign policy implications if the case were to continue.

On other occasions the concerns of the State Department have persuaded courts to dismiss claims brought under ATCA.[16]

Foreign governments also may express their views about existing lawsuits and U.S. courts have seriously considered these views.[17]

In short, drastic curtailment of ATCA is unnecessary to prevent unwarranted effects on foreign policy. The lower courts have applied the numerous means at their disposal on a case-by-case basis, allowing ATCA suits to proceed where warranted, while dismissing cases that would intrude into the political branches' management of foreign relations.

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16. For example, in *Sarei v. Rio Tinto*, the court dismissed human rights claims after the U.S. government opined that adjudication would interfere with an ongoing peace process in Bougainville. 221 F. Supp. 2d 1116, 1178-1200 (C.D. Cal. 2002). In *Saltany v. Reagan*, the court dismissed claims against the United Kingdom alleging that nation was complicit in a purportedly illegal United States attack on Libya. 702 F. Supp. 319, (D.D.C. 1988).

17. *See, e.g., Sarei v. Rio Tinto*, 221 F. Supp. at 1204-1205.

V. ATCA CLAIMS NEED NOT INTERFERE WITH THE WAR AGAINST TERRORISM.

There is no general, negative relationship between ATCA cases and the war against terrorism. Our collective experience has not indicated that countries are less likely to participate in an important collective goal because of claims pursued by individual litigants in U.S. courts.

Indeed, if there is any general relationship between ATCA and the war on terrorism, it is a positive one. An effective war against terrorism is dependent on building international respect for human rights standards and the rule of law. The United States must demonstrate its own commitment to holding accountable those who violate human rights.

President George W. Bush said in his 2002 State of the Union address: "We have a great opportunity during this time of war [against terrorism] to lead the world toward the values that will bring lasting peace . . . America will always stand firm for the non-negotiable demands of human dignity: [including] the rule of law [and] limits on the power of the state . . ."[18]

In a speech to the Heritage Foundation on October 31, 2001, Lorne W. Craner, Assistant Secretary for Democracy, Human Rights and Labor, stated that "maintaining the focus on human rights and democracy worldwide is an integral part of our response to the attack and is even more essential today than before September 11. They remain in our interest in promoting a stable and democratic world."[19]

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18. President Bush's address is available at http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html.

19. Remarks of Lorne W. Craner, Assistant Secretary for Democracy, Human Rights, and Labor to the Heritage Foundation (Oct. 31, 2001) available at *http://www.state.gov/g/drl/rls/rm/2001/6378.htm*.

Mr. Craner continued:

> As Dr. Condoleeza Rice said only a week after the horrific attack on September 11, 2001, 'We are not going to stop talking about the things that matter to us, human rights, religious freedom and so forth and so on. We're going to press those things; we would not be American if we did not.'[20]

Eliminating or eviscerating a statute such as the Alien Tort Claims Act which furthers accountability for those who commit acts of violence would thus undercut U.S. credibility in our critical war against terrorism.

VI. ALLOWING USE OF ATCA AGAINST CORPORATIONS ALLEGEDLY INVOLVED IN THE COMMISSION OF HUMAN RIGHTS VIOLATIONS FURTHERS U.S. FOREIGN POLICY.

The petitioners and their *amici* assert that ATCA cases harm U.S. investment and trade policy.[21] These assertions overlook another core United States interest: namely, ensuring that U.S. corporate entities comply with international human rights obligations in their conduct abroad. When U.S. companies operate overseas, their actions reflect upon the United States as a whole. Our standing as a world leader and our commitment to human rights are diminished if we allow our citizens, including our corporate citizens, to commit human rights violations with impunity.

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20. *Id.*

21. *See e.g.*, Brief for Petitioner at 36 (ATCA will "undermine the ability of the political branches to use economic leverage to advance policy goals"); Brief for the National Foreign Trade Council, *et al.* as Amici Curiae in Support of Petitioner, at 4.

Not long ago the United States State Department, together with the United Kingdom, established the *Voluntary Principles on Security and Human Rights*, which provide guidelines for companies in the extractive industries for "maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms."[22]

In announcing those principles, the Secretary of State noted that they "demonstrat[e] that the best-run [oil and mining] companies realize that they must pay attention not only to the particular needs of their communities, but also to universal standards of human rights, and that in addressing these needs and standards there is no necessary conflict between profit and principle."[23]

The then Assistant Secretary for Economic and Business Affairs (who continues to serve in that position) elaborated:

> We are committed to advancing America's international economic engagement consistent with the principles of good governance. These principles are vital to our own economic security here at home and are the only sustainable way for United States companies to engage abroad. It is, after all, a fact of business life that companies want to do business in places where the rule of law prevails, where contracts and laws are enforced, where the customs agents work honestly and expeditiously, where the judiciary is fair

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22. Voluntary Principles on Security and Human Rights, United States Department of State (Dec. 19, 2000) at 1.

23. Remarks of Secretary of State Madeleine K. Albright, Press Briefing, (December 20, 2000), Washington, D.C., available at *http://secretary.state.gov/www/statements/2000/001220.html*.

> and effective, and where human rights are respected. . . . [I]t is good not only for American business, but also for the global investment climate that American firms be the best corporate citizens possible. . . . *More comprehensive risk assessments, guidance on interactions between companies and host government security, and best security practices are central to any investment climate.*[24]

Some *amici* argue that "abusive ATS litigation ultimately deters investment" by U.S. businesses.[25] While their speculation could prove to be accurate in particular cases, our experience has not shown ATCA litigation over the past 20 years to have had this effect: The U.S. courts have not allowed "abusive" litigation, the number of lawsuits to date has been small and businesses have continued to invest overseas. Our understanding is that a corporation may be held liable only if it provided direct and substantial assistance in the commission of a human rights violation.[26] ATCA helps ensure that multinational corporations complicit in gross violations of international and U.S. law will not enjoy impunity.

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24. E. Anthony Wayne, Assistant Secretary of State for Economic and Business Affairs, Announcement of "Voluntary Principles on Security and Human Rights," U.S. Department of State (December 20, 2000) available at *http://www.state.gov/www/policy_remarks/2000/ 001220_wayne_principles.html* (emphasis added).

25. Amici Curiae Brief of National Foreign Trade Council, *et al.* at 12.

26. *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 323-324 (S.D.N.Y. 2003).

Another argument presented by Petitioners' *amici* is that it is unfair to penalize U.S. corporations when the practices of foreign companies may be worse.[27] But ATCA cases have been allowed only where there is evidence that corporations directly assist in violations of fundamental international human rights norms. These cases set a modest and reasonable standard for U.S. businesses to meet.

The fact that some foreign companies might be better positioned to win foreign contracts by engaging in abuses was also an argument advanced against U.S. laws prohibiting bribery and corruption. Yet the U.S. Foreign Corrupt Practices Act of 1977 prohibits U.S. companies from winning foreign contracts by engaging in bribery or corruption.[28] We are not aware that any American court has declined to adjudicate American corporate compliance with those legal standards.

Similarly, the fact that some foreign companies might win foreign contracts from U.S. bidders by engaging in security practices that may include torture and murder, which are equally forbidden to U.S. companies, is hardly sufficient reason for an American court to decline to adjudicate claims that American corporate practices violate international legal standards that forbid gross human rights abuses.

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27. Brief of Amici National Foreign Trade Council, *et al.* at 12.

28. 15 U.S.C. § 78a *et seq.*

CONCLUSION

Our experience as diplomats for the United States leads us to conclude that the Alien Tort Claims Act is consistent with U.S. foreign policy goals. Where a conflict arises between claims brought in a particular ATCA case and other U.S. foreign policy goals, the U.S. courts have shown that they can effectively address these conflicts. We urge this Court to reject the challenges to ATCA made by petitioners and their *amici*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF THE *AMICI CURIAE*

Amici are international jurists who have served as judges and experts on international human rights bodies around the world. They submit this brief to advise the Court that the line of precedent beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), is regarded around the world as a major contribution of U.S. law to the international protection of human rights.[1]

Amici believe that the *Filartiga* doctrine—which the Congress has embraced and the Executive Branch has long relied upon in its dealings with foreign states and international bodies—has enabled the United States to influence positively the development of international human rights law. The *Filartiga* decision has enhanced U.S. credibility in foreign courts and legislatures and in international organizations by demonstrating that the United States takes its international human rights obligations seriously. Overturning *Filartiga* would damage the United States' global standing and reputation on issues of international human rights. *Amici* submit that it would be a fundamental error of law and policy for this Court to abandon this position of global leadership.[2]

---

1. Consents to the filing of *amicus curiae* briefs already are on file with the Clerk of the Court pursuant to Rule 37(3) of the Rules of the Supreme Court of the United States. Pursuant to Rule 37(6), counsel for *amici* certify that no counsel for a party authored this brief in whole or in part and that no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

2. *Amici* take no position on whether the *Filartiga* doctrine was properly applied to the facts of this case. They urge affirmance in the belief that the Court would err greatly if it were to overturn the *Filartiga* line of precedent, on which the ruling below was

(Cont'd)

The *amici* subscribing to this brief are:

Mary Robinson was United Nations High Commissioner for Human Rights from 1997-2002. She previously served seven years as President of the Republic of Ireland, and twenty years in the Irish Senate.

Radhika Coomaraswamy is the United Nations Special Rapporteur for Violence Against Women and Director of the International Center on Ethnic Studies in Colombo, Sri Lanka. She is a member of the Global Faculty of the New York University School of Law.

C. John R. Dugard is an *ad hoc* Judge in the International Court of Justice and Professor of International Public Law at the University of Leiden, Netherlands. He has been a member of the U.N. International Law Commission since 1997.

Marcus Einfeld, A.O. Q.C., served as a Justice of the Federal Court of Australia from 1987-2001 and was founding President of the Australian Human Rights and Equal Opportunity Commission. He currently is President of Australian Legal Resources International.

Elizabeth Evatt was formerly Chief Judge of the Family Court of Australia and was a member of the U.N. Human Rights Committee from 1993-2000. She currently is a member of the International Commission of Jurists and Honorary Visiting Professor at the University of New South Wales Law School.

(Cont'd)
based. The other *amicus curiae* briefs supporting Respondents fully explain why violations of the prohibitions against state-sponsored transborder abduction and arbitrary detention should be treated as "torts in violation of the law of nations" for purposes of the Alien Tort Claims Act.

Thomas M. Franck has served as *ad hoc* Judge of the International Court of Justice and is Murray and Ida Becker Professor of Law Emeritus at New York University School of Law and Director of its Center for International Studies.

Jochen Frowein is a Commissioner on the International Commission of Jurists and Director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany. He was Vice-President of the European Commission of Human Rights of the Council of Europe from 1981-1993.

Richard J. Goldstone was a Justice of the Constitutional Court of South Africa from 1994-2003, and was Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda from 1994-1996. He is currently a Global Visiting Professor of Law at New York University School of Law.

Louis Henkin is Professor Emeritus and Director of the Institute of Human Rights at Columbia Law School. He served as United States Representative on the U.N. Human Rights Committee from 1999-2002.

Rev. Theodore M. Hesburgh, C.S.C., was President of the University of Notre Dame from 1952-1987. He has held 15 Presidential appointments, including as a charter member of the U.S. Commission on Civil Rights in 1957, as chair of that commission from 1969-1972, and as ambassador to the 1979 U.N. Conference on Science and Technology for Development. Between 1979-1981 he also chaired the Select Commission on Immigration and Refugee Policy, the recommendations of which became the basis of Congressional reform legislation five years later.

Lord Lester of Herne Hill, Q.C., is President of Interights (the International Centre for Human Rights based in London) and a member of the Joint Parliamentary Select Committee on Human Rights.

Claire L'Heureux-Dubé served as a Justice of the Supreme Court of Canada from 1987-2002 and is currently on the Faculty of Law at Laval University, Québec, Canada.

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Pedro Nikken served as President of the Inter-American Court of Human Rights from 1983-1985. He is currently Professor Emeritus of Civil and International Law at the Law School of the Central University of Venezuela and a member of the International Commission of Jurists.

Sir Nigel Rodley is a Professor of Law and Chair of the University of Essex Human Rights Center. He is also a Commissioner of the International Commission of Jurists and Vice-Chair of the Human Rights Committee. From 1993 to 2001 he was the Special Rapporteur on Torture of the United Nations Commission on Human Rights.

Henry G. Schermers is a former member of the European Commission on Human Rights and is currently Director of the Europa Institute, Leiden University.

Stefan Trechsel was President of the European Commission of Human Rights and is currently Professor of Criminal Law and Procedure at the University of Zurich Law School.

SUMMARY OF ARGUMENT

The briefs urging this Court to reverse the decision below represent a well-orchestrated effort to persuade the Court to overturn *Filartiga* and the twenty-four years of jurisprudence based on it. Yet for nearly a quarter of a century, the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350 (1993), as interpreted by *Filartiga,* has provided a domestic judicial remedy for serious violations of universal and obligatory rules of customary international law that has promoted U.S. leadership in protecting human rights.

Filartiga and its progeny represent a major contribution of U.S. law to the protection of human rights around the world. In submissions to the United Nations, the Executive Branch has called *Filartiga* a "pivotal decision" demonstrating the U.S. commitment to protect human rights. The Executive Branch has repeatedly stressed this line of cases as a model for redressing human rights violations and as evidence of U.S. compliance with its international obligations. In turn, U.N. bodies have incorporated the principles expressed in *Filartiga* into different areas of human rights law, and national and international tribunals have applied these principles to adjudicate and redress severe human rights violations.

The *Filartiga* line of cases has contributed to two global trends in human rights. First, the *Filartiga* line serves as a model for providing all individuals, including noncitizens, with an effective judicial remedy for acts of torture, genocide, and other serious violations of international law, wherever

they may be committed. Second, *Filartiga* and its progeny have contributed to the progressive and responsible development of international legal norms prohibiting torture, genocide, and other serious violations of international law.

Amici curiae submit that it would be a fundamental error of law and policy for the Court to overturn *Filartiga* and to abandon the position of human rights leadership that the United States has achieved as a result of that decision. Nor do *amici* understand such a drastic step to be necessary under U.S. law to prevent misuse of the ATCA. U.S. courts have regularly declined subject matter jurisdiction over ATCA claims when no actionable legal norm exists and have regularly dismissed meritless cases for lack of personal jurisdiction, inadequate service of process, sovereign immunity, *forum non conveniens,* or considerations of comity. The Executive Branch has not hesitated to inform courts when it believes that an ATCA lawsuit unduly interferes with U.S. foreign relations. And Congress remains free to use its legislative powers to modify the scope of the ATCA by expanding, limiting, defining or conditioning the causes of actions that may constitute torts in violation of international law, just as it used its powers to enact the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (1993)).[3]

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3. The TVPA, although an important development in U.S. and international law, is not an adequate substitute for the ATCA, as construed in *Filartiga*. Because the TVPA provides no remedy for acts committed under color of U.S. law, the ATCA is the only remedy available to noncitizens for international law violations committed abroad under color of U.S. official authority. *Compare* 28 U.S.C. § 1350 *with* 42 U.S.C. § 1983 (providing a remedy for only U.S. citizens or others within a U.S. jurisdiction). Furthermore, the TVPA provides a cause of action for only two violations of international law—torture and extra-judicial killing—and does not authorize civil redress for other serious violations of international law.

Indeed, when Congress enacted the TVPA, it expressly endorsed *Filartiga*'s interpretation of the ATCA.[4] For the Court now to overturn this pivotal decision—in spite of the support shown for *Filartiga* and its progeny by the lower courts, the Executive Branch, and the Congress—would undercut the role the United States has played in advancing human rights across the world.

ARGUMENT

I. THE UNITED STATES HAS LONG RECOGNIZED *FILARTIGA* AS AN IMPORTANT MODEL FOR PROVIDING AN EFFECTIVE REMEDY FOR SEVERE, EXTRATERRITORIAL HUMAN RIGHTS VIOLATIONS.

The Alien Tort Claims Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2003). In *Filartiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit held that the ATCA conferred district court jurisdiction over a suit by Paraguayans against a Paraguayan official who had tortured their relative to death in Paraguay, while acting under color of governmental authority. 630 F.2d 876, 889 (2d Cir. 1980). The court found that official torture is a "tort . . . in violation of the law of nations" for purposes of the ATCA. *Id.* at 880.[5]

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4. *See* John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 St. Louis U. L.J. 539, 560 (1997) (noting Congress' decision not to interfere with *Filartiga* precedent).

5. The Second Circuit found that in "light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy (Cont'd)

Since then, a series of lower courts, including the Ninth Circuit in this case, have followed *Filartiga* in holding that federal courts have ATCA jurisdiction to hear suits by aliens based upon torts in violation of "specific, universal, and obligatory" norms of international law, wherever those torts may occur and without the need for additional statutory authority.[6]

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by virtually all of the nations of the world," the official torture of an individual held in detention violates the law of nations. 630 F.2d at 880.

6. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-06, n.11 (2d Cir. 2000) (reversing *forum non conveniens* dismissal of case involving claims including torture, crimes against humanity, and summary execution brought under ATCA and noting that *Filartiga* remains the leading case interpreting the ATCA), *cert. denied*, 532 U.S. 941 (2001); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (rejecting ATCA claims based on environmental damage because they did not meet the standard articulated by the Second Circuit); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-84 (9th Cir. 1998) (arbitrary arrest and detention actionable under ATCA but stating that plaintiff's arrest and detention in instant case were not arbitrary within meaning of international law); *Hilao v. Estate of Marcos*, 103 F.3d 789, 794-95 (9th Cir. 1996) (torture and arbitrary detention actionable under ATCA because they are in violation of specific, universal, and obligatory norms of international law); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996) (claim of torture actionable under the ATCA, and citing case law from both the Second and Ninth Circuits), *cert. denied*, 519 U.S. 830 (1996); *Kadic v. Karadzic*, 70 F.3d 232, 238-43 (2d Cir. 1995) (jurisdiction exists under the ATCA for torts in violation of well-established, universally recognized norms of international law, including genocide, war crimes, official torture, and summary execution), *cert. denied*, 518 U.S. 1005 (1996); *In re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) (violations of international law actionable under the ATCA must be of a norm, such as that proscribing torture,
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The *Filartiga* line of cases has helped the United States to fulfill its international responsibilities. The Executive Branch has repeatedly relied on *Filartiga* and the ATCA in representations to the United Nations. In 1995, the U.N. Commission on Human Rights "[c]all[ed] upon the international community to give increased attention to the right to restitution, compensation and rehabilitation of victims of grave violations of human rights and fundamental freedoms" and "[r]equest[ed] States to provide information to the Secretary-General about legislation already adopted, as well as that in the process of being adopted." *Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms*, U.N. Comm'n on Human Rights Res. 1995/34, U.N. ESCOR Comm'n on Human Rights, 51st Sess., 53d mtg., U.N. Doc. E/CN.4/RES/1995/34 (1995). In one of the most important reports received by the Secretary-General, the U.S. government called attention to the *Filartiga* line, emphasizing that the ATCA "represents an early effort by the United States Government to provide a remedy to individuals whose rights have been violated under international law." *Report of the Secretary-General Prepared Pursuant to Commission Resolution 1995/34*, U.N. ESCOR

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that is specific, universal, and obligatory); *Estate of Lacarno Rodriguez v. Drummond*, 256 F. Supp. 2d 1250, 1262 (N.D. Ala. 2003) (extra-judicial killing actionable under the ATCA); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439-41 (D.N.J. 1999) (claim of forced labor actionable under ATCA because it violates well-established, universally recognized norms of international law); *Jama v. INS*, 22 F. Supp. 2d 353, 362-63 (D.N.J. 1998) (claim of cruel, inhumane, and degrading treatment actionable under the ATCA); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass. 1995) (claims of torture, summary execution, arbitrary detention, and disappearance actionable under ATCA).

Comm'n on Human Rights, 52d Sess., Provisional Agenda Item 8, ¶ 13, U.N. Doc. E/CN.4/1996/29/Add.2 (1996); *see also Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Report of the United States*, U.N. Comm. Against Torture, 24th Sess., 424th mtg., ¶¶ 4-8, U.N. Doc. CAT/C/SR.424 (2001).

Several years later, in a report to the U.N. Committee Against Torture, the U.S. government again emphasized the importance of the ATCA, repeating key language from the 1996 report:

> U.S. law provides statutory rights of action for civil damages for acts of torture occurring *outside* the United States. One statutory basis for such suits, the Alien Tort Claims Act of 1789, codified at 28 U.S.C. § 1350, represents an early effort to provide a judicial remedy to individuals whose rights had been violated under international law.

Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Report of the United States of America, U.N. Comm. Against Torture, Addendum, ¶ 277, U.N. Doc. CAT/C/28/Add.5 (2000) (emphasis in original). The U.S. government characterized the decision in *Filartiga* as "pivotal" and described its subsequent extension to other human rights claims: "Since that decision was rendered, several other cases have explored the scope of the Act. Human rights lawyers now regularly invoke the Act in litigating international human rights principles in United States courts." *Id.* ¶ 278. The U.S. government explained that "[i]llustrative of recent cases involving extraterritorial acts of abuse are those brought against the self-proclaimed president of Bosnia-Herzegovina and against the estate of the former President of the Philippines." *Id.* ¶ 280 (citing *Kadic v. Karazdic*, 70 F.3d 232 (2d Cir. 1995), *In Re Estate of Ferdinand E. Marcos*, 25 F.3d 1467 (9th Cir. 1994)).

When the United States ratified the International Covenant on Civil and Political Rights in 1992, it assumed an obligation under Article 2.3 of that treaty to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity . . . ." International Covenant on Civil and Political Rights, art. 2.3, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171. The Human Rights Committee has emphasized the importance of civil remedies for victims of international human rights violations. *See, e.g.*, *Report of the Human Rights Committee*, U.N. GAOR, 53d Sess., Supp. No. 40, vol. I, ¶ 260, U.N. Doc. A/53/40 (1998) (Concluding Observations: Finland) ("Criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms. . . . [Priority should continue to be given] to positive measures and to civil processes which are able to determine issues of compensation or other remedies, especially in cases of discrimination."). The Committee has also explained that civil remedies must be available for all individuals, including noncitizens, within the territory of a state party. *See, e.g.*, *Bakhtiyari v. Australia*, U.N. Human Rights Comm., 79th Sess., Communication No. 1069/2002, ¶ 12, U.N. Doc. CCPR/C/79/D/1069/2002 (2003) (concluding in case involving noncitizen that "the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established"). The development of the *Filartiga* line has enabled the United States to provide effective civil remedies to victims of human rights violations in accordance with its obligation under the Covenant.

Far from creating open-ended U.S. jurisdiction, *Filartiga* has been recognized as having given rise to an especially cautious and responsible application of U.S. law, including prudent safeguards that promote a sensible exercise of jurisdiction, and a conservative approach to determining what constitutes an actionable "specific, universal, and obligatory" norm of international law.[7] This careful approach is now followed by other liberal democratic states.

Nor has *Filartiga* in any sense enshrined universal criminal jurisdiction, which is controversial in many countries.[8] When a state exercises universal criminal

7. Petitioner argues that the Court should eliminate the *Filartiga* line of cases because "plaintiffs have demonstrated creativity in the range of putative offenses they would bring within the statute's ambit." Petitioner's Brief at 45. Significantly, however, all the cases cited by the Petitioner as demonstrating such "creativity" were dismissed. *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 160-61 (2d Cir. 2003) (affirming dismissal of an action for violations of the right to life and the right to health from intranational pollution brought under the ATCA); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002) (affirming dismissal of the case for *forum non conveniens* for a class action suit brought by citizens of Peru and Ecuador alleging that defendant polluted rain forests and rivers in their countries, causing environmental damage and personal injuries); *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (affirming dismissal of claim for loss of money from distribution system of the state lottery for failing to state an actionable tort under the ATCA).

8. In separate submissions to the Committee Against Torture and to the U.N. Secretary-General, the U.S. government has emphasized those dimensions of ATCA litigation which significantly distinguish the U.S. federal cases from universal jurisdiction. The government explained:

> The jurisdiction of the district courts to hear claims under the Act is further limited by the constitutional requirement that the court obtain proper personal

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jurisdiction, it *asserts the right to acquire personal jurisdiction* over a defendant who is not otherwise properly subject to the *in personam* jurisdiction of the court—for example, by initiating extradition proceedings or issuing an international arrest warrant. In contrast, for an action to proceed under *Filartiga*, the defendant must be properly served according to the rules of the jurisdiction in which the action is filed, and prudential doctrines—such as *forum non conveniens*, sovereign and head-of-state immunity, and comity—fully empower courts to dismiss unwarranted cases.

II. THE *FILARTIGA* MODEL CONTRIBUTES TO INTERNATIONAL AND FOREIGN LEGAL NORMS FOR PROVIDING REDRESS FOR HUMAN RIGHTS VIOLATIONS.

Following the U.S. example, international organizations and foreign jurisdictions have regularly looked to *Filartiga* as a touchstone for promoting effective remedies for serious human rights violations.

A. International Organizations Recognize *Filartiga* as a Model in Human Rights Law.

The *Filartiga* jurisprudence is now internationally recognized as a leading source for elaborating core

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> jurisdiction over the defendant i.e., the perpetrator of the violation must be present within the territorial jurisdiction of the court or must otherwise be subject to the court's jurisdiction.

Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Report of the United States of America, U.N. Comm. Against Torture, Addendum, ¶ 279, U.N. Doc. CAT/C/28/Add.5 (2000); *see also Report of the Secretary-General Prepared Pursuant to Commission Resolution 1995/34*, U.N. ESCOR Comm'n on Human Rights, 52d Sess., Provisional Agenda Item 8, ¶ 14, U.N. Doc. E/CN.4/1996/29/Add.2 (1996) (submitting same statement).

international human rights obligations. As a result of its careful identification and application of conventional and customary international human rights law, *Filartiga* and its progeny have played a vital role both in identifying a class of fundamental human rights violations actionable under the ATCA, and in establishing a framework for remedying those violations.

Foremost among international human rights institutions that have recognized and promoted *Filartiga* are charter institutions of the United Nations, such as the U.N. Commission for Human Rights. The incorporation of the *Filartiga* approach into the international jurisprudence of the U.N. was in good measure due to efforts of the Executive Branch of the U.S. government, which has repeatedly cited the precedent as one of the prime examples of appropriate remedies for international human rights violations.

1. *United Nations.* The United Nations has recognized that the *Filartiga* line has made the United States a leader in providing judicial remedies for serious human rights violations. For example, the Division for Social Policy and Development of the United Nations Secretariat stated:

> The case of *Filartiga v. Pena-Irala*, heralded a trend towards the domestic incorporation of customary international law. The *Filartiga* court recognized that the law of nations is a dynamic concept, which should be construed in accordance with the current customs and usages of civilized nations . . . .

Division for Social Policy and Development of the United Nations Secretariat, *Compilation of International Norms and Standards Relating to Disability*, § 1.4 (Draft, July 2002) *available at* http://www.un.org/esa/socdev/enable/discom101.htm (last visited Feb. 25, 2004).

So, too, the Special Rapporteur appointed by the Commission on Human Rights to elaborate the "right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms" has relied on the ATCA as a leading example for states to "provide remedies for violations occurring outside their territory."[9] Similarly, the Special Rapporteur on Contemporary Forms of Slavery lauded the ATCA as "a potential forum for redress" in cases in which foreign fora have proven inadequate. *See* Special Rapporteur on Contemporary Forms of Slavery, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict*, U.N. ESCOR Comm'n on Human Rights, 50th Sess., Provisional Agenda Item 6, at App., ¶ 52, U.N. Doc. 4/Sub.2/1998/13 (1998). Other special rapporteurs have followed suit.[10]

The *Filartiga* line has also shaped the development of international human rights law in various United Nations

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9. *See* Note by the High Commissioner for Human Rights, *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, U.N. ESCOR Comm'n on Human Rights, 59th Sess., Provisional Agenda Item 11, ¶ 114, U.N. Doc. E/CN.4/2003/63 (2002).

10. For example, one Special Rapporteur emphasized the ATCA as a leading example of the responsibility "that 'home' States should put in place effective domestic regulation and monitoring mechanisms and provide effective remedies" for violations that occur abroad. The Special Rapporteur invoked the ATCA as an example of "effective remedies" for gross violations of international law, recognizing that the ATCA is limited in its "appli[cation] to customary international law norms, such as the prohibition of slavery, genocide, torture, crimes against humanity and war crimes." *Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food to the General Assembly*, U.N. GAOR, 58th Sess., Provisional Agenda Item 119(b) ¶ 40 & n.31, U.N. Doc. A/58/330 (2003) (citing U.S. cases following *Filartiga*).

organs. The International Law Commission (a U.N. body of elected international legal experts responsible for the development and codification of international law) relied on the *Filartiga* approach in determining standards for the hierarchy of international human rights norms. *Report of the Int'l Law Comm'n on the Work of its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, ch. IV.E.2, at 284 n.683, U.N. Doc. A/56/10 (2001). The Division for Social Policy and Development of the United Nations Secretariat also relied on *Filartiga* to identify the appropriate scope for judicially enforceable international human rights law:

> Customary law is critical to the role of human rights law. The domestic enforceability of customary international law is manifest in the case of *Filartiga v. Pena-Irala*. . . . [A]s made clear by this case . . . domestic court[s] may discover international legal principles by consulting executive, legislative and judicial precedents, international agreements, the recorded expertise of jurists and commentators, and other similar sources.

Division for Social Policy and Development of the United Nations Secretariat, *Compilation of International Norms and Standards Relating to Disability*. § 1.2 (Draft, July 2002) *available at* http://www.un.org/esa/socdev/enable/discom101.htm (last visited Feb. 25, 2004). Similarly, a 1993 U.N. Sub-Commission on Human Rights relied on *Filartiga* for developing appropriate standards for determining whether conditions of imprisonment fall below fundamental human rights guarantees. *See The Administration of Justice and the Human Rights of Detainees*, U.N. ESCOR Comm'n on Human Rights, 45th Sess., Provisional Agenda Item 10(a), ¶ 69, U.N. Doc. E/CN.4/Sub.2/1993/21 (1993).

2. *International Court of Justice.* A recent opinion of the International Court of Justice ("ICJ") highlighted the influential nature of the *Filartiga* precedent. In *Congo v. Belgium*, the ICJ held that a defendant was immune from prosecution by Belgian officials for alleged war crimes. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. 1 (Feb. 14, 2002). The U.S., British, and Dutch Judges filed a joint concurring opinion addressing the appropriate scope of universal criminal jurisdiction, an issue not addressed by the majority. The concurring Judges carefully distinguished universal criminal jurisdiction from other forms of jurisdiction that address extraterritorial conduct. The Judges gave special attention to ATCA jurisprudence, describing it as conforming to global trends of extending civil jurisdiction over extraterritorial conduct in appropriate cases. *Id.* ¶¶ 47, 48 (Joint Separate Opinion of Higgins, Kooijmans, and Buergenthal, JJ.) ("The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality."). The Judges also incorporated principles inherent in ATCA litigation—such as initiation of civil proceedings by victims—to restrict extraterritorial criminal jurisdiction.[11] The ATCA has thus served as an instructive global model for balancing human rights concerns and interstate relations.

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11. The Judges stated:

> [T]he desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or *juge d'instruction*. For example, persons related to the victims of the case will have requested the commencement of legal proceedings.

Congo v. Belgium, 2002 I.C.J. 1, at ¶ 59.

3. *International Criminal Tribunal for the former Yugoslavia.* The International Criminal Tribunal for the former Yugoslavia ("ICTY") has also drawn guidance from the *Filartiga* line. In an ATCA case following *Filartiga*, the U.S. Court of Appeals for the Second Circuit held that Bosnian Serb leader Radovan Karadzic could be held liable for genocide and war crimes, when properly subject to personal jurisdiction and served in the United States. *See Kadic v. Karadzic*, 70 F.3d 232, 236, 246-48 (2d Cir. 1995). In the first case prosecuted at the ICTY, the international judges relied on that Second Circuit decision in determining that crimes against humanity do not require an element of state action:

> [T]he United States Court of Appeals for the Second Circuit recently recognized that "non-state actors" could be liable for committing genocide, the most egregious form of crimes against humanity, as well as war crimes. Therefore, although a policy must exist to commit these acts, it need not be the policy of a State.

Prosecutor v. Tadic, ICTY Trial Chamber Opinion, No. IT-94-1-T, ¶ 655, 36 I.L.M. 908, 945 (1997) (citing *Kadic*, 70 F.3d at 232). In another significant case before the ICTY, the judges relied on *Filartiga* in determining the status of the prohibition against torture during wartime. *Prosecutor v. Furundzija*, ICTY Trial Chamber Opinion, No. IT-95-17/1-T, ¶ 147, 38 I.L.M. 317, 348 (1998) ("There exists today universal revulsion against torture: as a USA Court put it in *Filartiga v. Pena-Irala*, 'the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind.'") (quoting *Filartiga*, 630 F. 2d at 876).

4. *International Human Rights Bodies.* The Inter-American Commission on Human Rights has held that the

ATCA, as interpreted in *Filartiga*, constitutes an adequate and effective domestic remedy for international human rights violations. Inter-Am. C.H.R., Report No. 62/03, Petition P12.049, Kenneth Walker (United States), ¶¶ 47 & n.18, 50 (Oct. 10, 2003), *available at* http://www.cidh.org/annualrep/2003eng/usa.p12049.htm (last visited Feb. 25, 2004). The Commission found that aggrieved individuals must exhaust such a remedy prior to filing a petition with the Commission, *see id.* ¶ 47, thereby according greater deference to the U.S. judicial system because of the availability of the *Filartiga* remedy. *See id.* ¶ 47 n.18 (citing *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001)).

The supervisory organs of the major international human rights treaties have similarly encouraged states to exercise jurisdiction over human rights violations, even when such violations are committed outside their territory. *See, e.g.*:

- *Report of the Committee Against Torture*, U.N. GAOR, 52d Sess., Supp. No. 44, ¶ 42(j), U.N. Doc. A/52/44 (1997) (Concluding Observations/ Comments on Report Submitted by the Russian Federation) ("Absence of extraterritorial jurisdiction makes difficult or impossible the implementation of article 5, paragraph 1(b) of the Convention [establishing jurisdiction when the alleged offender is a national of that state].");

- U.N. ESCOR Comm. on Economic, Social and Cultural Rights, 30th Sess., ¶ 12, U.N. Doc. E/C.12/1/Add.86 (2003) (Concluding Observations on Report Submitted by Luxembourg) ("welcom[ing] the extraterritorial application of certain provisions of the Criminal Code, allowing for the criminal prosecution of persons, both nationals and non-nationals, for sexual crimes committed abroad");

- U.N. Convention on the Rights of the Child, 20th Sess., ¶ 22, U.N. Doc. CRC/C/15/Add.101 (1999) (Concluding Observations on Report Submitted by Sweden) (commending "current efforts to review domestic legislation so as to eliminate the 'dual criminality' requirement for . . . legislation" involving sexual exploitation of children outside national borders);

- U.N. Convention on the Rights of the Child, 20th Sess., ¶ 6, U.N. Doc. CRC/C/15/Add.98 (1999) (Concluding Observations on Report Submitted by Austria) ("welcom[ing] the adoption of legislation establishing" jurisdiction for nationals of the State party involved in the sexual exploitation of children" outside national borders);

- U.N. Comm. on the Elimination of Discrimination Against Women, ¶¶ 169, 178, U.N. Doc. A/51/38 (1996) (Concluding Observations on Report Submitted by Belgium) (commending "a landmark law" providing extraterritorial jurisdiction for trafficking in women).

In sum, the *Filartiga* doctrine has promoted a useful and growing partnership among the work of U.S. courts, international tribunals, foreign governments, and human rights organs.

B. Foreign Legal Systems Have Adopted the Approach of *Filartiga*.

Foreign courts have followed the measured approach articulated in *Filartiga* for selectively incorporating fundamental norms of international law into domestic law. In the *Pinochet* case, for example, the House of Lords relied

on cases in the *Filartiga* line for the proposition that torture is among a select group of customary international norms that are justiciable in national courts. *See Regina v. Bow St. Metro. Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147, 198, 248 (H.L. 1999) (judgments of Lord Browne-Wilkinson and Lord Hope of Craighead). In another case, the English Court of Appeal echoed these sentiments, discussing approvingly *Filartiga*'s characterization of torturers as "*hostis humani generis*." *Al-Adsani v. Gov't of Kuwait*, 107 I.L.R. 536, 544, 546 (Eng. C.A. 1996); *Al-Adsani v. Gov't of Kuwait*, 100 I.L.R. 465, 470 (Eng. C.A. 1994). In both cases, these British courts noted that the U.S. courts have limited the application of the ATCA in appropriate cases by doctrines such as foreign sovereign immunity. *See Bow St. Metro. Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. at 243-44 (judgment of Lord Hope of Craighead) (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993)); *Al-Adsani v. Gov't of Kuwait*, 107 I.L.R. 536, 547-48 (Eng. C.A. 1996) (same).[12]

The National Commission on Human Rights in India highlighted the importance of *Filartiga* in the development of national judicial remedies for violations of fundamental human rights. *See* National Commission on Human Rights, Sadar Patel Bhawan, Case No. 1/97/NHRC, ¶ 23 (Aug. 4, 1997), *available at* http://www.punjabjustice.org/legalbattles/nhrcdocs/aug97.htm (last visited Feb. 25, 2004). In particular, the Commission noted the effect of these developments on Indian law: "In India great strides have since been made in the field of evolving legal standards for remedial, reparatory, punitive and exemplary damages for violation of human rights." *Id.* ¶ 24.

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12. While the government of the United Kingdom has occasionally objected to what it has deemed exorbitant exercises of U.S. long-arm jurisdiction, those cases have not involved gross abuses of international law or crimes against humanity.

The ATCA has been complemented by parallel remedial efforts in other democratic countries. Many states now recognize that their international responsibilities require the exercise of jurisdiction over serious violations committed outside their territory, whether by their nationals or by foreign nationals. In recognition of these responsibilities, states have recently begun to identify the availability of their own relevant laws when reporting to the treaty bodies. *See, e.g.*:

- *Colombia*: *Second Periodic Reports of States Parties Due in 1993: Colombia*, U.N. Comm. Against Torture, ¶ 73, U.N. Doc. CAT/C/20/Add.4 (1995) (State Party Report) ("[T]he Penal Code establishes the notion of the extraterritoriality of Colombian criminal law, which satisfies the requirements . . . of the Convention against Torture. . . . 'Colombian criminal law shall apply . . . [t]o an alien who has committed an offence abroad prejudicial to another alien, if and only if . . . [h]e is in Colombian territory . . .'");

- *Denmark*: *Second Periodic Report of Denmark*, U.N. Comm. on the Rights of the Child, 27th Sess., 700th mtg., ¶ 51, U.N. Doc. CRC/C/SR.700 (2001) (Summary Record) ("Under an extraterritorial jurisdiction regime, the Danish courts could prosecute Danes for sexual abuse of children abroad.");

- *Luxembourg*: *Fourth Periodic Reports of States Parties:* Convention on the Elimination of Discrimination Against Women, art. 6, ¶ 31, U.N. Doc. CEDAW/C/LUX/4 (2002) ("Article 5-1 of the Code of Criminal Procedure, as amended, extends the application of the national law of Luxembourg

for certain offences committed on foreign soil by a national of Luxembourg or by a foreign national present in Luxembourg.");

- *Norway*: *Report of the Committee Against Torture*, U.N. GAOR, 44th Sess., Supp. No. 46, ¶ 88, U.N. Doc. CAT/A/44/46, (1989) (Concluding Observations: Norway) (noting that Norway provides jurisdiction for "offences committed outside Norwegian territory by non-Norwegian courts [sic], provided that the offender was present on Norwegian territory and that the offence was punishable either in the country where the act had been perpetrated or under Norwegian law");

- *Sweden*: *Second Periodic Report of Sweden*, U.N. Comm. on the Rights of the Child, 20th Sess., 522d mtg., ¶ 27, U.N. Doc. CRC/C/SR.522 (1999) (Summary Record) ("[T]he second report offered little more than the first [concerning issues of child abuse]. Swedish law in that matter was nonetheless commendable, and in fact provided for extraterritorial prosecutions.");

- *United Kingdom*: *Report of the Committee Against Torture*, U.N. GAOR, 47th Sess., Supp. No. 44, ¶ 117, U.N. Doc. CAT/A/47/44 (1992) (Concluding Observation) ("[T]he representative stated that the courts of Great Britain and Northern Ireland had wide extraterritorial jurisdiction to deal with any person present in the United Kingdom, regardless of the nationality of the offender or victim.").

In addition, many states indirectly provide civil remedies for serious violations of international law, even when they

are committed abroad, by allowing victims to append civil claims to criminal prosecutions. *See, e.g.*:

- *France*: Code de Procédure Pénale, arts. 689, 689-2–689-10 (extraterritorial jurisdiction for crimes of torture, terrorism, and others); *id.* arts. 2-3 (authorizing victims to join criminal prosecution as *partie civile*);

- *Germany*: Völkerstrafgesetzbuch (Code of Crimes Against International Law of 2002), §§ 6-12 (criminalizing genocide, crimes against humanity and war crimes); *id.* § 1 ("This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany."); Strafprozeßordnung (Criminal Procedure Code), §§ 403-406c (authorizing victims to append civil claims to criminal cases);

- *Greece*: Penal Code, art. 8 (extraterritorial jurisdiction for many serious international offenses); Criminal Procedure Code, arts. 63-70, 82-88, 108, 137D, 468, 480, 488 (authorizing victims to append civil claims to criminal cases);[13]

- *Italy*: Codice Penale (Penal Code), art. 10 (extraterritorial criminal jurisdiction over serious criminal offenses involving harm to foreign persons, foreign states, and the European Union); Law No. 498 of 3 November 1988 (extraterritorial criminal jurisdiction for torture); Codice di Procedura Penale (Criminal Procedure Code), arts. 74, 90, 101, 394, 396 (enabling victims to bring civil claims for

13. *Amici* have relied in part on an English-language summary available at http://www.u-j.info/index/140054 (last visited Feb. 25, 2004).

compensation and restitution within criminal proceedings);

- *Netherlands*: International Crimes Act of 2003, §§ 2-8, 10, 21 (extraterritorial jurisdiction for genocide, war crimes, torture, and crimes against humanity); Wetboek van Strafvordering (Criminal Procedure Code), art. 51a (authorizing victims to append civil claims to criminal prosecution);

- *Spain*: Ley Organica del Poder Judicial (Organic Law of the Judicial Power), art. 23.4 (extraterritorial criminal jurisdiction for serious violations of international law including genocide and terrorism); Ley de Enjuiciamiento Criminal (Criminal Proceedings Law), art. 112 (providing that any criminal complaint filed by a victim is also a civil claim unless the claimant expressly states otherwise).

As this Court is well aware, too many countries in the world have dysfunctional judicial systems or fail to provide their own citizens with any remedies even for the grossest abuses that occur at home. The *Filartiga* doctrine, and the parallel precedents and legislation it has spawned abroad, have prudently helped to fill this glaring gap. This Court should not now turn the clock back by undoing the foundation stone of an important and evolving global jurisprudence.

CONCLUSION

Filartiga and its progeny represent a major contribution of U.S. law to the protection of human rights around the world. This Court should preserve the *Filartiga* approach to the ATCA, which has provided a visible and influential model of U.S. human rights leadership for other jurisdictions, by affirming the judgment below.

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(20)

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No. 03-339

In the
Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND RELIGIOUS ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici curiae submit this brief in support of Respondent Humberto Alvarez-Machain, with the written consent of the parties.[1] As listed in Appendix A, *Amici* include dozens of international human rights organizations and religious organizations working to protect basic human rights in this country and around the world. Although each organization has its own particular focus and mandate, *amici* share a commitment to three issues at the heart of this case. First, all human beings have a fundamental right to be free from egregious human rights abuses, including genocide; slavery; summary execution; disappearance; torture; cruel, inhuman or degrading treatment or punishment; arbitrary detention; crimes against humanity; and war crimes. Second, those responsible for such violations must be held accountable, as a matter of simple justice, to deter future abuses and to offer redress to the survivors of abuse. Finally, the Alien Tort Claims Act, 28 U.S.C. § 1350 (ATCA), is fully consistent with basic principles of international human rights law and contributes significantly to the worldwide movement to end impunity and hold human rights abusers accountable.

SUMMARY OF ARGUMENT

The nations of the world have reached a consensus that international law prohibits a set of core human rights abuses. These prohibitions are universally considered to be binding; no nation claims the right to violate them. Although litigants have attempted to assert claims over a wide range of additional abuses, the courts have consistently applied the Alien Tort Claims Act to a short list of egregious human rights abuses.

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[1]Letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Despite the universal condemnation of these human rights violations, perpetrators all too often escape punishment. Finding means to hold perpetrators accountable is a key priority for governments, including the U.S. government, as well as for international and nongovernmental organizations around the world. Domestic and international actors have undertaken varied initiatives, including criminal prosecutions initiated both by public prosecutors and by private individuals, civil litigation, and assorted administrative proceedings. Each state chooses mechanisms appropriate to its local legal system. Civil litigation under the ATCA is part of a global effort to address impunity and to hold perpetrators of egregious abuses accountable for their actions.

The facts presented below support the finding that Respondent suffered arbitrary arrest and detention in violation of a core principle of international human rights law. The judgment holding Petitioner responsible for his violation of the rights of Respondent is an important contribution to the worldwide battle against impunity. Petitioner improperly attempts to paint this case as hindering efforts to combat terrorism. If there is any connection, it is exactly the opposite: using judicial means to redress egregious abuses furthers the struggle against terrorism, rather than undermining it.

ARGUMENT

Every court to have reached a decision on the issue has held that the Alien Tort Claims Act creates a cause of action authorizing individuals to seek damages for injuries inflicted by violations of international law. The organizations joining this brief support both the historical conclusion that the first Congress intended this result and the modern analysis that judicial consideration of such lawsuits complies with the U.S. Constitution. These points have been fully briefed by Respondent and other *amici curiae* and will not be repeated

here. Instead, *amici* submit this brief to demonstrate that the modern application of the ATCA, which permits victims of core human rights abuses to seek civil redress in U.S. courts, is fully consistent with international law and with the practice of domestic legal systems around the world. International norms increasingly permit -- or even require -- states to hold perpetrators of human rights abuses accountable for their actions. Civil lawsuits are one manner in which the United States contributes to the international movement to fight impunity and provide redress to survivors of abuse.

I. CASES DECIDED PURSUANT TO THE ALIEN TORT CLAIMS ACT ADDRESS CORE HUMAN RIGHTS NORMS OF CENTRAL CONCERN TO THE INTERNATIONAL COMMUNITY AND ACCEPTED AS BINDING BY THE UNITED STATES.

The Alien Tort Claims Act permits claims for violations of internationally protected human rights, those that fall within the definition of a "tort . . . in violation of the law of nations." As properly applied by the courts, these violations include a short list of the most egregious human rights abuses, all universally condemned by binding norms that are of central concern to the international community and are recognized as obligatory by the U.S. government.

The protection of individual human rights has been recognized at least since World War II as one of the central goals of the international legal system. The Charter of the United Nations, a treaty ratified by virtually every nation in the world, proclaimed the promotion of human rights and fundamental freedoms as one of the primary purposes of the organization. Art. 1(3). The United States has repeatedly declared itself one of the leading advocates for the promotion of human rights. In 2003, the U.S. Department of State reaffirmed this longstanding commitment:

> In a world marching toward democracy and respect for human rights, the United States is a leader, a partner and a contributor. We have taken this responsibility with a deep and abiding belief that human rights are universal.... [T]heir protection worldwide serves a core U.S. national interest.

U.S. Dep't of State, 2002 Country Reports on Human Rights Practices, Preface (Mar. 2003) [hereinafter Dep't of State, 2002 Human Rights Report].[2] Over the past few decades, widely ratified human rights treaties have linked almost every state in a common commitment to protect the most basic human rights.[3]

The ATCA properly addresses those abuses on which the international community has reached a consensus. The requirement that a plaintiff allege a tort "in violation of the law of nations" narrows the reach of the statute to a short list of universally recognized, clearly defined international law abuses. As the Second Circuit recognized in *Filártiga v. Peña-Irala,* this standard "is a stringent one," applying to "well-established, universally recognized norms of international law." 630 F.2d

[2]*Available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18132pf.htm.

[3]*See, e.g.*, International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 [hereinafter ICCPR] (ratified by 151 states, including the United States); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (ratified by 133 states, including the United States); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Treaty Doc. No. 80-1, 78 U.N.T.S. 277 [hereinafter Convention Against Genocide] (ratified by 135 states, including the United States). For ratification information, see Status of Ratifications of the Principal International Human Rights Treaties (Nov. 2, 2003), *available at* http://www.unhchr.ch/pdf/report.pdf. *See also* Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR].

876, 881, 888 (2d Cir. 1980).[4] Other Circuits have consistently followed this approach.[5] As a result, the courts have upheld ATCA claims only when based upon core abuses that are readily definable and universally condemned by the international community. Indeed, the history of ATCA litigation demonstrates that the statute has been carefully applied to reach the core international law violations that fall within the scope of the law of nations, including genocide; slavery; summary execution; disappearance; torture; cruel, inhuman or degrading treatment or punishment; arbitrary detention; crimes against humanity; and war crimes.

Genocide, long recognized as among the most egregious violations of human rights, is clearly defined under both international and U.S. law as the attempt "to destroy in whole or in part, a national ethnic, racial or religious group as such." Convention Against Genocide, art. II. As stated in the Senate Report accompanying the Genocide Convention Implementation Act, "[t]he crime of genocide is among the most depraved acts that can be committed." S. Rep. No. 100-333, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4158. The Convention Against Genocide reflects this universal prohibition, which is now recognized as binding on all nations, regardless of whether they

[4]*Accord Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003).

[5]The Ninth Circuit has recognized that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." *Hilao v. Estate of Marcos,* 25 F.3d 1467, 1475 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995). The Eleventh and Fifth Circuits have also applied this strict standard to define the limited set of torts "in violation of the law of nations." *See, e.g., Abebe-Jira v. Negewo,* 72 F.3d 844 (11th Cir. 1996) (finding torture actionable under the ATCA, citing case law from both the Second and Ninth Circuits); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (rejecting claims based on environmental damage because they did not meet the standard articulated by the Second Circuit).

have ratified the Convention.[6] Given the universal recognition of genocide as a violation of international law, the courts have uniformly upheld application of the ATCA to claims of genocide. *See, e.g., Kadic v. Karadzic,* 70 F.3d 232, 242 (2d Cir. 1995) (violent acts with the intent to destroy religious and ethnic groups would constitute genocide); *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (campaign of violence directed against non-Muslim population of southern Sudan constituted genocide within the reach of the ATCA).[7] As summarized by the court in *Presbyterian Church of Sudan,* the "genocidaire" has "come to be considered *hostis humani generis,*" an enemy of all mankind. 244 F. Supp. 2d at 309.

Widely ratified treaties dating back to the nineteenth century prohibit *slavery,* the first violation of human rights to be banned by international law.

> It is well-established that prohibitions against slavery and slave-related practices have achieved the level of customary international law and have attained *jus cogens* status. An array of conventions and treaties, both multilateral and bilateral in nature, contain these prohibitions and proscribe such practices in times of war and during peace.

M. Cherif Bassiouni, *Enslavement as an International Crime,* 23 N.Y.U. J. INT'L L. & POL. 445, 445 (1991).[8] In condemning trafficking in persons, Congress emphasized that "the right to be free from slavery and involuntary servitude is among [the] inalienable rights" of all human beings. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (2000), § 102 ("The international community has repeatedly condemned slavery and involuntary servitude."). Claims of slavery or the slave trade constitute actionable causes of action under the ATCA. *Presbyterian Church of Sudan,* 244 F. Supp. 2d at 326.

Virtually every major human rights agreement protects against *summary execution*, or the arbitrary deprivation of life. An execution is considered arbitrary if it is neither "lawful punishment pursuant to conviction in accordance with due process of law" nor "necessary under exigent circumstances." Restatement (Third) of Foreign Relations Law of the U.S. § 702 cmt. f (1987) [hereinafter Restatement]. The prohibition against summary execution is non-derogable.[9] Congress has recognized summary execution as a human rights violation by enacting the Torture Victim Protection Act, 28 U.S.C. § 1350 (recognizing a cause of action for summary execution). Congress has also denied U.S. funding to countries that practice "gross violations of internationally recognized human rights," and has defined

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[6] *See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* 1951 I.C.J. 15, 23 (May 28) (confirming that "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.),* 1996 I.C.J. 595, 616 (July 11) (affirming that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*."

[7] *See also Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (claims based on genocide in Bosnia-Herzegovina); *Mushikiwabo v. Barayagwiza,* No. 94 CIV. 3267 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) (claims based on genocide in Rwanda).

[8] *See also Barcelona Traction, Light and Power Co. Ltd (Belg. v. Spain)* 1970 I.C.J. 3 (Feb. 5) (holding that protecting people from slavery is an obligation *erga omnes*).

[9] *See, e.g.,* ICCPR, arts. 4, 6 (the right not to be arbitrarily deprived of life is never derogable, not even in times of public emergency); European Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 2, 15, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] (neither war nor any other public emergency is a justification for summary execution).

these violations to include a "flagrant denial of the right to life, liberty or the security of person," a concept that encompasses summary execution. *See* 22 U.S.C. § 262(d) (aid to international financial institutions), § 2151(n) (development aid), and § 2304 (security assistance). Claims of summary execution clearly satisfy the requirements of the ATCA. *See Kadic,* 70 F.3d at 243-44 (summary executions committed in the former Yugoslavia); *Hilao,* 25 F.3d at 1475 (summary executions in the Philippines).[10]

International law condemns *enforced disappearance* as a violation of several interrelated fundamental human rights. As such, numerous international agreements and decisions condemn "disappearance," including the ICCPR, arts. 6, 7, 9, 10, 14, 15, 17, and the UDHR, arts. 3, 5, 9, 10, 11 (as interpreted by G.A. Res. 173, U.N. GAOR, 33d Sess., Supp. No. 45, at 158, U.N. Doc. A/33/173 (1978)).[11] The Restatement § 702(c) includes disappearance as a violation of the international law of human rights. Disappearance has been defined as a detention or abduction by state officials or their agents, followed by official refusal to acknowledge the abduction or to disclose the detainee's fate. Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 133, U.N. GAOR, 47th

[10]*See also Estate of Cabello v. Fernandez-Larios,* 157 F. Supp. 2d 1345, 1358-60 (S.D. Fla. 2001) (summary execution of civilian arrested after military coup in Chile); *Xuncax v. Gramajo,* 886 F. Supp. 162, 184-85 (D. Mass. 1995) (summary executions committed by Guatemalan military).

[11]*See also* Annual Report of the Inter-American Commission on Human Rights, Organization of American States, AG/Res. 666 (XIII-0/83) (1983) (denouncing disappearance as "an affront to the conscience of the hemisphere and . . . a crime against humanity."); *Velasquez-Rodriguez,* Inter-Am. C.H.R. (ser. C), No. 4, ¶¶ 155-58, *reprinted in* 28 I.L.M. 291, 322-324 (1989) (finding that in "disappearing" Velasquez-Rodriguez, Honduras violated his rights to life, humane treatment, and personal liberty as defined by articles 4, 5, and 7 of the American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (*entered into force* July 18, 1978)).

Sess., Preamble, U.N. Doc. A/Res/47/133 (1992). Claims of disappearance trigger ATCA jurisdiction. *Forti v. Suarez-Mason,* 694 F. Supp. 707, 711 (N.D. Cal. 1988) (finding the "existence of a universal and obligatory international proscription of the tort of 'causing disappearance.'"); *Hilao,* 25 F.3d at 1475 (same).[12]

Every major human rights instrument prohibits *torture,* including the Convention Against Torture. The prohibition against torture is also a binding norm of customary international law. As the U.S. executive branch has stated:

> This uniform treaty condemnation of torture provides a strong indication that the proscription of torture has entered into customary international law. . . . While some nations still practice torture, it appears that no state asserts a right to torture its nationals. Rather, nations accused of torture unanimously deny the accusation and make no attempt to justify its use. That conduct evidences an awareness that torture is universally condemned.[13]

This prohibition is well-ingrained in U.S. domestic law, which makes torture committed anywhere in the world a federal crime if the perpetrator is found within the United States, 18 U.S.C. § 2340A; prohibits the extradition of individuals illegally in the United States to a place where they may be tortured, 22 C.F.R. § 95.2 (2004); and denies federal foreign aid to countries where torture takes place, 22 U.S.C. § 2304 (§502B of the Foreign Assistance Act). The courts have uniformly recognized that the ATCA encompasses claims of torture. As stated in *Filártiga,* 630 F.2d at 890, "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani*

[12]*See also Xuncax*, 886 F. Supp. at 184-85.

[13]Memorandum for the United States as Amicus Curiae at 12-13, 16, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090).

generis, an enemy of all mankind." *See also Hilao,* 25 F.3d at 1475; *Abebe-Jira,* 72 F.3d at 846-48.

All of the major international human rights instruments prohibit *cruel, inhuman, or degrading treatment or punishment* as a norm distinct from torture, including the Convention Against Torture, the ICCPR, arts. 4, 7 (derogation from right to be free of cruel, inhuman, or degrading treatment not permitted even in time of public emergency), and the UDHR, art. 5 ("No one shall be subjected to... cruel, inhuman or degrading treatment or punishment.").[14] Both the legislative and executive branches of the U.S government have determined that cruel, inhuman, or degrading treatment or punishment violates international law. *See* 22 U.S.C. § 2304(d)(1) (listing cruel, inhuman or degrading treatment or punishment among "gross violations of internationally recognized human rights"); Dep't of State, 2002 Human Rights Report, Overview (stating that the right to be free from cruel, inhuman, or degrading treatment or punishment is an "internationally recognized individual" right).[15] As interpreted by the U.S. government, cruel, inhuman or degrading treatment "means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." U.S. Reservation to Art. 16 of the Convention Against Torture, 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990). Claims of cruel, inhuman and degrading treatment fall within the

[14]*See also* European Convention, art. 3.

[15]*See also United States Consular and Diplomatic Staff in Tehran (U.S. v. Iran),* 1980 I.C.J. 3 (May 24) (the executive branch successfully invoked provisions of international human rights instruments proscribing cruel, inhuman, or degrading treatment); Restatement § 702(d) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment.").

reach of the ATCA. *Abebe-Jira,* 72 F.3d 844.[16]

Numerous international instruments prohibit *arbitrary arrest or detention,* including the ICCPR, art. 9(1) ("No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."), and the UDHR, art. 9 ("No one shall be subjected to arbitrary arrest, detention or exile.").[17] This prohibition has been recognized as a binding norm of customary international law, derogable only "in time of public emergency which threatens the life of the nation." ICCPR, art. 4. "No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." *Rodriguez-Fernandez v. Wilkinson,* 654 F.2d 1382, 1388 (10th Cir. 1981). A detention is arbitrary when not pursuant to lawful authority. Restatement § 702 cmt. h.[18] The ATCA properly applies to allegations of arbitrary detention. *Mehinovic,* 198 F. Supp. 2d at 1349.[19]

Crimes against humanity were first codified as a violation of

[16]*See also Mehinovic,* 198 F. Supp. 2d at 1347-49; *Estate of Cabello,* 157 F. Supp. 2d at 1361; *Xuncax,* 886 F. Supp. at 186-87; *Paul v. Avril,* 901 F. Supp. 330 (S.D. Fla. 1994). *But see Forti v. Suarez Mason,* 672 F. Supp. 1531, 1543 (N.D. Cal. 1987), on reconsideration 694 F. Supp. at 711-12 (early case rejecting cruel, inhuman or degrading treatment; holding has not been followed by subsequent cases).

[17]The prohibition against arbitrary arrest and detention was included in the Magna Carta, art. 39: "No freeman shall be taken, or imprisoned . . . except by the lawful judgment of his peers or by the law of the land."

[18]*See also* United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* at 7, U.N. Doc E/CN.4/826/Rev.1 (1964) (an arbitrary arrest or detention is one not in accordance with procedures established by law). See full discussion *infra* Point III.

[19]*See also Eastman Kodak v. Kavlin,* 978 F. Supp. 1078, 1092-95 (S.D. Fla. 1997); *Xuncax,* 886 F. Supp. at 184-85; *Paul,* 901 F. Supp. 330; *Forti,* 672 F. Supp. at 1541-42.

international law in the Nuremberg Charter following World War II. Nuremberg Charter, art. 6(c). Although the concept dates back to the early part of the twentieth century, the Nuremberg codification for the first time established international criminal responsibility for perpetrators who were the same nationality as their victims. Theodor Meron, *Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 263 (2000). A 1947 resolution of the U.N. General Assembly affirmed the prohibition of crimes against humanity. G.A. Res. 95(I), U.N. Doc. A/64/Add.1, at 188 (1947). The prohibition has since been included in the statutes creating the International Criminal Tribunal for the Former Yugoslavia, art. 5; the International Criminal Tribunal for Rwanda, art. 3; the Special Court for Sierra Leone, art. 2; and the Rome Statute establishing the International Criminal Court, art. 7.[20] The prohibition of crimes against humanity is now a binding rule of customary international law.[21] Congress has repeatedly recognized the status of crimes against humanity as a violation of international law. In 1998, for example, Congress passed legislation "urg[ing] the President to call upon the United Nations to establish an international criminal tribunal for the purpose of indicting, prosecuting, and imprisoning Saddam Hussein and other Iraqi officials who are responsible for crimes against humanity, genocide, and other criminal violations of international law." Iraq Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178 (1998). Cases alleging crimes against humanity properly fall within the ATCA. *Kadic*, 70 F.3d at 242-

[20]The widely ratified statute of the International Criminal Court, art. 7(1), defines a crime against humanity as one of a series of acts of violence "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." The statute had been ratified by 92 nations as of February 2004.

[21]Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 557 (1995) ("Crimes against humanity are crimes under customary law.").

43.[22]

War crimes such as murder, torture, and arbitrary detention of civilians, committed in the course of armed conflict, have long been recognized as heinous violations of international law. See, e.g., Common Article 3 of the four Geneva Conventions, which have been ratified by the United States and over 190 countries, as well as the provisions defining "grave breaches" of the Conventions.[23] The United States explicitly refers to grave breaches of the Geneva Conventions and Common Article 3 in defining "war crimes" that are to be prosecuted under the War Crimes Act, 18 U.S.C. § 2441. Moreover, U.S. courts have held repeatedly that war crimes violate international law. *See In re Yamashita*, 327 U.S. 1, 14-16 (1946); *Kadic*, 70 F.3d at 242-43; Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 INT'L CONCILIATION 304 (April 1949) (collecting cases confirming the liability of private individuals for committing war crimes).

As this overview confirms, these basic prohibitions are universally recognized as binding rules of international law, applicable to all nations of the world. The United States shares this general consensus, recognizing each of these norms as binding international obligations. There is also a clear consensus as to the definition of each, and U.S. courts have had no

[22]*See also Presbyterian Church of Sudan*, 244 F. Supp. 2d at 324-27; *Mehinovic*, 198 F. Supp. 2d at 1352-54; *Estate of Cabello*, 157 F. Supp. 2d at 1360-61.

[23]Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 50, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 51, 6 U.S.T. 321, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287.

difficulty identifying and applying these definitions.

The enforcement of these norms is of central concern to the international human rights community represented by *amici,* as well as to governments and national and international organizations around the world. The application of the ATCA to claims alleging violations of these core international norms is fully consistent with the mandate of the statute to provide redress to individual victims of tortious abuses of the "law of nations."

Equally important, the courts have firmly rejected claims of violations of the law of nations when they find that they do not meet the stringent standard required by the statute: that is, claims that do not allege violations of well-established, universally recognized norms of international law. For example, federal courts have repeatedly dismissed ATCA cases based on environmental harms. *See, e.g., Flores,* 343 F.3d at 160-61; *Beanal,* 197 F.3d at 167. Courts have also dismissed a panoply of other ATCA actions that failed to raise recognized claims under international law such as fraud, negligence, censorship, commercial torts, conversion, or defamation.[24]

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[24]*Hamid v. Price Waterhouse,* 51 F.3d 1411, 1418 (9th Cir. 1995) (fraud); *Tamari v. Bache & Co. S.A.L.,* 730 F.2d 1103, 1104 (7th Cir. 1984) (fraud); *Jones v. Petty Ray Geophysical Geosource, Inc.,* 722 F. Supp. 343, 348 (S.D. Tex. 1989) (negligence); *Guinto v. Marcos,* 654 F. Supp. 276, 280 (S.D. Cal. 1986) (censorship); *De Wit v. KLM Royal Dutch Airlines,* 570 F. Supp. 613, 618 (S.D.N.Y. 1983) (commercial torts); *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.,* 528 F. Supp. 1337, 1347 (S.D.N.Y. 1982) (commercial torts); *Cohen v. Hartman,* 634 F.2d 318, 320 (5th Cir. 1981) (conversion); *IIT v. Vencap, Ltd.,* 519 F.2d 1001, 1020 (2d Cir. 1975) (conversion); *Maugein v. Newmont Mining Corp.,* No. CIV.A. 02-M-204, 2004 WL 73279, at *5 (D. Colo. Jan. 15, 2004) (defamation).

The federal courts have also dismissed claims involving well-established, universally recognized norms of international law when the pleadings fail to support the essential elements of the claim. *See, e.g., Beanal,* 197 F.3d at 168 (genocide claim unavailable when pleadings "are devoid of discernable means to define or identify conduct that constitutes a violation of international law"); *Estate of Rodriguez v. Drummond Co.,* 256 F. Supp 2d 1250, 1261 (N.D. Ala. 2003) (genocide claim unavailable where plaintiffs fail to allege that persecution was due to national, ethnic, racial, or religious reasons).

By authorizing civil litigation for violations of universally recognized international human rights norms, the ATCA, as carefully applied by the courts, serves the important goal of human rights accountability. ATCA litigation represents an important contribution to the international struggle against impunity and in favor of the rule of law.

II. CIVIL LAWSUITS UNDER THE ALIEN TORT CLAIMS ACT ARE PART OF A COMMON INTERNATIONAL EFFORT TO ADDRESS THE PROBLEM OF IMPUNITY BY HOLDING PERPETRATORS OF EGREGIOUS ABUSES ACCOUNTABLE.

The need to hold accountable those who commit egregious human rights abuses is among the most pressing issues facing the world community today. International associations, governments, including the U.S. government, and nongovernmental organizations share this assessment. The responsibility for enforcing international law norms rests primarily on domestic legal systems, which have adopted varied mechanisms to address the problem of impunity. Civil litigation in U.S. courts under the Alien Tort Claims Act represents one such mechanism. This approach is fully consistent with international law, and contributes significantly to the worldwide effort to hold perpetrators of human rights violations accountable for their actions.

A. Holding perpetrators accountable and providing redress for victims of abuse are key priorities for governments, including the U.S. government, as well as for international associations and nongovernmental organizations around the world.

The commitment to accountability is one of the enduring legacies of the international response to the horrors of the Second World War. In the famous words of the Nuremberg Judgment, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." International Military Tribunal (Nuremberg), Judgment, Oct. 1, 1946, 41 AM. J. INT'L L. 172, 221 (1947). As Justice Jackson explained:

> [The Nuremberg Charter] for the first time made explicit and unambiguous what was theretofore . . . implicit in International Law, namely, that to . . . persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with [a war of aggression], or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible.

Robert H. Jackson, Final Report to the President on the Nuremberg Trials, Oct. 7, 1946, U.S. Dep't St. Bull. vol. XV, nos. 366-391, Oct. 27, 1946, at 771, 774. The commitment to the protection of human rights and, as a corollary, the punishment of human rights abuses were soon reflected in the U.N. Charter, the Universal Declaration of Human Rights, the Convention Against Genocide, the ICCPR, and the Convention Against Torture. Nevertheless, although international norms have defined the core human rights guarantees with ever greater precision, enforcement of these protections remains inconsistent, and therefore has become an increasingly urgent priority.

The United States government has long proclaimed its

commitment to the international effort to bring to justice those who violate core human rights norms, dating back at least to the Nuremberg Tribunals and including the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. This commitment was reflected in the executive branch's support for the *Filártiga* doctrine when the case was pending before the Second Circuit. It was reiterated in 1991 by President George H.W. Bush, who, when signing into law the Torture Victim Protection Act, expressed his support for "the fundamental goals that this legislation seeks to advance." He stated, "In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere." Statement on Signing the Torture Victim Protection Act of 1991, Mar. 12, 1992, 28 Weekly Comp. Pres. Doc. 465, 466 (Mar. 16, 1992).

The same commitment has been expressed repeatedly by President George W. Bush and other members of the current administration. In his 2002 State of the Union address, President Bush linked human rights and respect for the rule of law to efforts to combat terrorism: "We have a great opportunity during this time of war [against terrorism] to lead the world toward the values that will bring lasting peace . . . . America will always stand firm for the non-negotiable demands of human dignity . . . ."[25] A spokesperson for the administration further detailed the U.S. commitment to the rule of law:

> Here's what America believes in: We believe in justice and the promotion of the rule of law. We believe those who commit the most serious crimes of concern to the international community should be punished. We believe that states, not international institutions are primarily responsible for ensuring justice in the international

[25] *Available at* http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html.

> system. We believe that the best way to combat these serious offenses is to build domestic judicial systems, strengthen political will and promote human freedom.[26]

U.S. policy has consistently recognized the importance of accountability for serious violations of international norms and encouraged the use of domestic legal remedies for that purpose.

The concept of accountability includes not only punishment of perpetrators, but also redress to victims and survivors of human rights abuses. The UDHR states explicitly: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating . . . fundamental rights. . . ." Art. 8. The ICCPR requires states "to develop the possibilities of judicial remedy," and "to ensure that the competent authorities shall enforce such remedies when granted." Art. 2(3). Several international agreements contain similar obligations, while others also specifically protect the right to compensation.[27]

In order to implement this internationally recognized right to a remedy, governments must open their legal systems to claims

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[26]Mark Grossman, Remarks to the Center for Strategic and International Studies, May 6, 2002, *available at* http://www.state.gov/p/9949.htm (statement regarding the U.S. withdrawal of its signature from ICC agreement, noting that the U.S. agreed with the underlying principles, but not the ICC itself).

The United States regularly reaffirms this principle in international settings. For example, the executive branch recently supported the adoption by consensus of a resolution "emphasiz[ing] the importance of taking all necessary and possible steps to hold accountable perpetrators . . . of violations of international human rights and humanitarian law." U.N. Commission on Human Rights, Res. 2003/72 (April 25, 2003).

[27]*See, e.g.*, ICCPR, art. 9(5) ("Anyone who has been the victim of an unlawful arrest or detention shall have an enforceable right to compensation."); Convention Against Torture, art. 14(1) ("Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation . . . ."); Declaration on Enforced Disappearances, art. 5 (perpetrators are liable to both criminal penalties and civil suit).

by victims and survivors of human rights abuses. States must "[a]dopt appropriate and effective judicial and administrative procedures and other appropriate measures that provide fair, effective, and prompt access to justice" and "[a]fford appropriate remedies to victims."[28] International law does not define the exact nature of the judicial proceedings appropriate to meet these obligations. It therefore leaves each state to adopt procedures appropriate to its own legal system.

B. States adopt varied mechanisms to enforce international law that are appropriate to their national legal systems, including civil, criminal and administrative proceedings and both public and private endeavors.

Violations of international law have long been redressed primarily through domestic courts. Historically, enforcement of the protections due to diplomats, the rules governing neutrality, the laws of prize, and the punishment of pirates were delegated to national legal systems, which applied international norms to the issues pending before them. Today, enforcement of international human rights norms continues to rely heavily on domestic legal systems. Each domestic system, however, applies the mechanisms appropriate to its own legal process.[29] As a result, a wide variety of enforcement efforts are underway

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[28]Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni U.N. ESCOR, 56th Sess., at §§ 2(b), 2(c), 3(d), U.N. Doc. E.CN.4/2000/62. *See generally* U.N. Commission on Human Rights, Basic Principles and Guidelines on the Right to a Remedy (rev. Oct. 24, 2003), U.N. Doc. E/CN.4/2004/57 (2004) (discussing the internationally protected right to substantive and procedural remedies, including equal and effective access to justice).

[29]*See generally* Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002).

around the world.

In a state with a fully functioning judicial system, victims of human rights abuses should have access to domestic remedies in the forum in which the violations occur. Human rights abuses constitute crimes for which the perpetrators should be prosecuted. Victims should be able to obtain compensation by attaching claims to the criminal action, through independent civil lawsuits, and by means of other models, such as truth commissions or other administrative mechanisms. *See generally* Steven R. Ratner & Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* (2d ed. 2001).

In addition to domestic remedies for local abuses, international law *requires* that states provide redress for certain human rights abuses that occur in other states. This obligation reflects in part the reality that a domestic legal system may be incapable of affording justice for massive abuses, because the local government is complicit in the human rights violations or because the local judicial system is not able to afford adequate remedies. It also reflects a concern that perpetrators not escape justice by fleeing to safe havens in other nations. The Geneva Conventions, for example, require state parties to search for persons alleged to have committed "grave breaches" of the laws of war and to "bring such persons, regardless of their nationality, before [their] own courts." *See, e.g.*, Geneva Convention I, arts. 49, 50. Similarly, a state party to the Convention Against Torture, art. 5(2), is required to prosecute an alleged offender present in its territory, unless the accused is extradited to a state that has jurisdiction to prosecute. Several treaties addressing terrorism authorize prosecution of offenders, regardless of where the crimes were committed. *See, e.g.*, International Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; International Convention for the Suppression of Terrorist Bombings, Jan. 9,

1998, 37 I.L.M. 249 (1998).[30] These provisions reflect a common pattern in international treaty law: the state where a perpetrator is found must either send the accused to another state for prosecution or initiate prosecution in its own courts. Clark, 57 NORDIC J. INT'L L. at 85.

In addition, international law *authorizes* all states to hold accountable perpetrators of other international abuses. International Law Association, Final Report on the Exercise of Jurisdiction in Respect of Gross Human Rights Offences 4-5 (2000).[31] Thus, even where not specifically *obligated* to provide domestic remedies for abuses occurring in other nations, many states have chosen to authorize criminal prosecutions, civil lawsuits or other comparable measures in fulfillment of their general obligation to hold accountable perpetrators of gross human rights abuses. The peculiarities of each national legal system determines which of these varied procedures it uses.

In the United States, public prosecutors can file criminal charges for torture committed anywhere in the world. 18 U.S.C. §§ 2340, 2340A, 2340B. Genocide and war crimes also constitute crimes within the U.S. legal system. 18 U.S.C. §§ 1091, 2441. In addition, along with the ATCA, three statutes enacted since 1992 authorize civil claims by victims of human rights abuses. The Torture Victim Protection Act creates a right to sue for torture or extrajudicial execution. 28 U.S.C. § 1350 (1992). As part of an anti-terrorism initiative, Congress has also authorized civil suits for victims of terrorism. 18 U.S.C. § 2333

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[30]For additional treaties, see Roger S. Clark, *Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg*, 57 NORDIC J. INT'L L. 49 (1988), which provides a comprehensive analysis of treaty provisions authorizing jurisdiction over international offenses.

[31]*See also* Amnesty International, Universal Jurisdiction: The Duty of States to Enact and Implement Legislation (2001) [hereinafter Amnesty International, Universal Jurisdiction].

(1994). A 1996 amendment to the Foreign Sovereign Immunities Act (FSIA) permits civil suits for torture, extrajudicial killing, and other abuses against foreign governments designated as "state sponsor[s] of terrorism." 28 U.S.C. § 1605(a)(7). Each statute represents one mechanism by which the United States complies with its obligation to provide remedies to victims of human rights abuses.

Countries around the world comply with their obligation to facilitate accountability through mechanisms adapted to their domestic legal systems. Germany, for example, recently adopted a statute permitting criminal prosecution for crimes in violation of international law, even where the crimes have no connection to Germany.[32] Many nations have similar laws authorizing prosecution for international crimes, at least where the defendant is present in the forum state. The Netherlands, for example, asserts jurisdiction to prosecute for war crimes and torture committed elsewhere.[33] The Criminal Justice Act of 1988 permits prosecution in the United Kingdom of extraterritorial acts of torture.[34] Austria, Denmark, France, Ireland, Italy, Spain, Australia, New Zealand, South Africa and Canada all permit similar criminal prosecutions.[35]

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[32]Gesetz zur Einführung des Völkerstrafgesetzbuches (Act to Introduce the Code of Crimes Against International Law), BGBl I.S. 2254 (June 26, 2002) (English translation available at http://www.bmj.bund.de/images/11461.pdf).

[33]*Prosecution of Darko Knesevic*, HR Nov. 11, 1997, 1998 Dutch Law Reports 463 (war crimes); *Prosecution of Bouterse*, HR Sept. 18, 2001, *available at* http://www.rechtspraak.nl (LJN NO AB 1471) (torture).

[34]Criminal Justice Act, c.134 (Eng.).

[35]*See, e.g.*, Penal Code, art. 64(1)(6) (Aus.) (translation found in Austria's initial State party report to the Committee against Torture (CAT/C/5/Add.10), ¶¶ 23, 24) (torture, war crimes); Penal Code § 8(5) (Den.) (torture, war crimes); Criminal Procedure Code, arts. 689 to 689-10 (Fr.) (torture, terrorism, piracy, among others); Geneva Conventions Act (1962), as amended by the Geneva Conventions (Amendment) Act (1998)

Pursuant to these statutes, domestic criminal prosecutions target defendants accused of human rights violations committed outside the forum state, generally when the alleged perpetrators are found in the forum or the victims are nationals of the forum state. To cite just a small set of examples, in the Netherlands, an army officer faces trial for acts of torture and rape committed in what was then Zaire (now the Democratic Republic of the Congo).[36] Four Rwandans were convicted in Belgium for crimes committed during the 1994 genocide in Rwanda.[37] Argentine naval officers are currently in jail in Spain, awaiting trial for genocide and terrorism after having been extradited from

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§ 3, and Criminal Justice (U.N. Convention Against Torture) Act (2000) §§ 2, 3 (Ir.) (torture, war crimes); Law No. 498 (Nov. 3, 1988), art. 3(1)(c), Penal Code, arts. 7(5), 10, Law No. 962 (Oct. 9, 1967) (Italy) (torture, genocide); Organic Law of the Judicial Power 6/1985 (July 1), art. 23.4 (Spain) (genocide, terrorism, piracy, among others); Crimes Act (1988) art. 7 (Aus.) (torture); International Crimes and International Criminal Court Act (2000), arts. 9, 10 (N.Z.) (genocide, crimes against humanity); Implementation of the Rome Statute of the International Criminal Court Act (2002) (S. Afr.) (torture, war crimes, among others); Crimes against Humanity and War Crimes Act (2000), c. 24 (Can.) (crimes against humanity, war crimes). *See generally* Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford Monographs in International Law Series) (2003) (describing legal structure in 14 countries); Redress Trust and International Federation for Human Rights, *Universal Jurisdiction in the European Union: Country Studies* (2003).

Approximately 125 nations permit prosecution for international crimes committed abroad, regardless of the nationality of the perpetrator. Amnesty International, Universal Jurisdiction 3.

[36]Anthony Deutsch, *Dutch Court Charges Congolese Colonel,* AP, Sept. 30, 2003 (explaining that Dutch authorities established a special branch to prosecute people found in the Netherlands who are suspected of responsibility for genocide and other war crimes in other countries); *DRC officer accused of torture to go on trial in March,* AFP, Jan. 7, 2004.

[37]*In re Vincent Ntezimana, et al.*, Brussels Court of Assizes, June 8, 2001, *available at* http://www.asf.be/AssisesRwanda1/fr/fr_VERDICT_verdict.htm.

Mexico.[38] In Switzerland, a Rwandan man was convicted of grave breaches of the Geneva Conventions for abuses committed during the genocide.[39] Courts in a dozen countries have exercised such jurisdiction. Amnesty International, Universal Jurisdiction 4.

Private parties, not public prosecutors, have initiated most of these prosecutions, as permitted by the criminal procedures of many civil law legal systems. The Pinochet extradition battle, for example, began as a criminal investigation in Spain initiated by private organizations. Moreover, criminal procedures in many civil law systems permit private persons injured by a crime to pursue a claim for compensation as part of a public or private criminal prosecution.[40] In Spain, for example, a civil claim is automatically attached to a criminal action.[41] Thus, because they allow victims of egregious human rights abuses to seek remedies from the perpetrators, privately initiated criminal prosecutions have much in common with U.S. civil lawsuits under the ATCA.

Civil lawsuits for human rights violations and criminal prosecutions do not exhaust the permissible domestic remedies. Lawsuits founded on domestic tort law also serve to hold perpetrators accountable and to provide redress to victims of human rights abuses. Claims that might be filed in the United

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[38]*Extradición Amparo en Revisión* 140/2002 (June 12, 2003) (Ricardo Miguel Cavallo) (Mexico Supreme Court decision), *available at* http://www.scjn.gob.mx/inicial.

[39]*See* Luc Reydams, International Decision, *Niyonteze v. Public Prosecutor*, 96 AM. J. INT'L L. 231 (2002).

[40]*See generally* J. A. Jolowicz, Procedural Questions, in 11 International Encyclopedia of Comparative Law, ch. 13, at 5-11 (Andre Tunc ed., 1986) (describing the interdependence of civil and criminal actions in many legal systems).

[41]Código Penal [C.P.], arts. 109-100 (Spain); Ley De Enjuiciamiento Criminal [L.E.Crim], art. 100 (Spain).

States under the ATCA have been litigated as negligence suits in England, Canada, and Australia. *See* Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT'L & COMP. L. REV. 451, 456-58 (2001) (listing cases). Accountability in domestic legal systems also proceeds through a range of administrative actions. For example, the United States and many other nations have long used immigration restrictions to exclude those who have committed certain human rights violations. *See* 8 U.S.C. § 1182(a)(3)(E) (declaring that those who participated in Nazi persecutions or engaged in genocide are inadmissible to the United States). Administrative actions to freeze or seize the bank accounts of those accused of human rights violations also further the same goals.[42]

The three foreign government *amici* affirm both the importance of accountability in international law and the need to enforce human rights norms through appropriate procedures. Brief of Amici Curiae Government of the Commonwealth of Australia, et. al. at 2, 27, *Sosa v. Alvarez-Machain*, 331 F.3d 604 (9th Cir. 2004) (No. 03-339). Their challenge to the ATCA is based on a fundamental misconception that the statute is applied indiscriminately to cases having no connection to the United States. To the contrary, U.S. courts have applied the statute primarily to U.S.-based defendants. Moreover, traditional doctrines, such as forum non conveniens and exhaustion of domestic remedies, serve to weed out cases that properly should

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[42]*See, e.g., Hilao*, 25 F.3d at 1476-80 (affirming injunction preventing the Marcos estate from disposing of assets, including Swiss bank accounts); Naomi Roht-Arriaza, *Truth Commissions and Amnesties in Latin America: The Second Generation*, 92 AM. SOC'Y INT'L L. PROC. 313, 315 (1998) (describing a proceeding in which a Spanish court asked Switzerland to freeze assets of some forty Argentine military officers under investigation for human rights abuses in Argentina).

be litigated in the country in which the abuses took place.[43] Most of the cases the governments cite in their parade of horribles have already been dismissed by U.S. courts; motions to dismiss are pending in several others. *Id.* at 12-13 nn. 13-25.

The foreign governments also err in asserting that international law precludes the assertion of jurisdiction over civil claims in the absence of a specific treaty authorization. The crux of their objection is that U.S. courts have in the past applied U.S. substantive law to hold foreign corporations liable for conduct that is permitted by their own national laws and by international law. *See, e.g., id.* at 9 (discussing antitrust cases). Indeed, the three governments are concerned about the South Africa apartheid litigation for exactly that reason: they fear that the U.S. courts will impose liability for conduct that was lawful under domestic and international law. However, if the conduct does not violate universally recognized norms, it does not trigger liability under the ATCA. The appropriate response would be a motion to dismiss the claims for failure to state a violation of a universally established international norm. Such a motion is currently pending in the *apartheid* cases. There is no reason to find the ATCA to be unconstitutional or harmful to U.S. foreign relations merely because one set of plaintiffs has asserted claims that allegedly fall outside the narrow boundaries of the statute.

Moreover, as discussed in detail above, each domestic legal system implements its international law obligations in the manner best suited to its local procedures. In the United States, that entails civil litigation. In many civil law countries, it entails

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[43]Significantly, the governments note that their concerns would be "ameliorate[d]" if U.S. courts applied a doctrine of exhaustion of domestic remedies. *Id.* at 24-25 n.36. But the forum non conveniens doctrine that is applied by U.S. courts requires dismissal of a lawsuit if an adequate, alternative forum provides a more efficient venue -- a standard that inevitably leads to dismissal of claims that do not exhaust available domestic remedies.

privately initiated criminal prosecutions with civil claims attached. International jurisdictional rules do not distinguish among the varied measures appropriate to a national judiciary. *See* Stephens, *Translating Filártiga*, 27 YALE J. INT'L L. at 39-53. Rather, through a variety of legal mechanisms, public or private actors further accountability through remedies that seek both compensation to those injured and punishment of the perpetrators.

Civil litigation under the ATCA is part of the global effort to address impunity and hold perpetrators of egregious abuses accountable for their actions. As such, it plays a central role in the worldwide movement to fight impunity.

III. THE ARBITRARY ARREST AND DETENTION OF RESPONDENT VIOLATED A CORE PRINCIPLE OF INTERNATIONAL HUMAN RIGHTS LAW.

All parties before the Court acknowledge that arbitrary arrest and detention violate core norms of international law. All parties recognize, as they must, that the U.S. government cannot disregard lawful limits on governmental authority to arrest and detain private individuals. All agree that such unlawful actions are no less a violation of fundamental norms when a government hires private persons to undertake the illegal tasks. These points of agreement represent a fundamental consensus that all governments are bound to obey the law when they exercise their authority to arrest and detain.

The basic facts of this case are not in dispute. Respondent Alvarez-Machain was abducted from his medical office and detained against his will by Petitioner Sosa and other Mexican nationals hired by the U.S. Drug Enforcement Agency. The abductors acted in Mexico without lawful authority under domestic or international law. Respondent was held without notification to his family or the lawful authorities in Mexico and

transported to the United States the next day.

Applied to these facts, as found by the lower courts, the core principles set out above demonstrate that Respondent's arrest and detention were arbitrary because they were not pursuant to law.[44] Unlawful arrests and detentions violate clearly established rules of international law. Indeed, over 10 years ago, the U.N. Working Group on Arbitrary Detention reviewed Respondent's case and concluded that the abduction constituted arbitrary detention in violation of art. 9 of the UDHR and art. 9 of the ICCPR. U.N. Doc. E/CN. 4/1994/27, Dec. No. 48/1993 (USA). The Working Group found that "no legal basis whatsoever can be found to justify the deprivation of liberty." *Id.* As an arbitrary arrest and detention in violation of core principles of international law, the violation of Respondent's rights is thus actionable under the ATCA.[45]

The length of Respondent's detention is not determinative: neither international law nor domestic law place a temporal limit on arbitrary detention. The ICCPR, for example, contains no such condition, stating clearly, "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." Art. 9(1). The UDHR similarly states, "No one shall be subjected to arbitrary arrest, detention or exile." Art. 9. *See also* United Nations, *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention*

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[44]The court below correctly noted that arbitrariness could also stem from an "unjust" arrest or detention under international law, but found no need to undertake this separate analysis because of its determination that the arrest was unlawful. *Alvarez-Machain*, 331 F.3d at 623 n.21.

[45]The Ninth Circuit also correctly concluded that the arrest and detention of Respondent in Mexican territory, without the consent of the Mexican authorities, violated international law. *Id.* at 621. Although this issue is not presently before the Court, the unauthorized exercise of law enforcement power outside of U.S. territory further rendered the arrest and detention unlawful.

and Exile 7 (1964) ("an arrest or detention is arbitrary if it is . . . on grounds or in accordance with procedures other than those established by law . . . ."). Although the Restatement defines the violation as *prolonged* arbitrary detention in § 702(e), none of the international agreements include this restriction, and U.S. cases have not imposed it. *See, e.g., Paul,* 901 F. Supp. at 333-34 (concluding one of the plaintiffs suffered arbitrary detention although he was held for less than ten hours). The right to be free from arbitrary arrest and detention cannot be measured in terms of a predetermined number of hours or days.

Finally, the Ninth Circuit correctly held that Alvarez' arrest and detention were unlawful because Congress has not authorized the Drug Enforcement Agency to make extraterritorial arrests. This issue is not a mere technicality: the rule of law and indeed this nation's fundamental principles of democracy are demeaned if a government agency can authorize an abduction without regard for the law, detain an individual unlawfully, and then refute the right to compensation or remedy for the violation. To conclude otherwise would be to unravel the fundamental principles on which both U.S. law and international law are so firmly based.

CONCLUSION

The United States has long presented itself to the world as a champion of human rights, both at home and abroad. U.S. foreign policy claims the promotion of international human rights norms as one of its central goals. The refusal to serve as a safe haven for those who have committed serious human rights violations is indispensable to that effort. As the U.S. Government argued in its *amicus* brief in support of the plaintiff in *Filártiga*, where well-defined, universally recognized human rights are at issue, "a refusal to recognize a private cause of action might seriously damage the credibility of our nation's commitment to the protection of human rights." Judicial repeal

of the ATCA would undercut the U.S. claim of leadership in the struggle to enforce basic human rights.

Such a retreat from a commitment to the rule of law would be particularly damaging today, as the United States seeks international cooperation to combat terrorism. The United States has asked the countries of the world to ensure that they not serve, intentionally or unwittingly, as safe havens for those who commit egregious violations of international law. To make this request credible, and to lead by example, the United States cannot do otherwise within its own borders. The judgment below, holding Petitioner Sosa responsible for violations of international human rights law, is consistent with U.S. domestic law and international law, and makes an important contribution to the worldwide battle against impunity. It should, therefore, be affirmed.

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(21)

No. 03-339

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

—v.—

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AS *AMICI CURIAE* OF WOMEN'S HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici curiae submit this brief in support of Respondent Humberto Alvarez-Machain, with the written consent of the parties.[1] Amici include leading women's human rights organizations in the United States and around the world that have been working to end impunity for grave violations of the human rights of women, to challenge violations, and to support women seeking justice. *Amici* join in this brief to emphasize the importance of the Alien Tort Claims Act (ATCA) in providing a civil forum through which a limited number of individual women victims of such violations, can hold accountable perpetrators who are in the United States. *Amici* wish to underscore that, thereby, the ATCA contributes to end impunity and to justice, healing, and empowerment for the individuals involved, and for women around the globe. It also contributes to the global understanding of the gravity and impermissibility of such gender-specific violations, to the deterrence of these crimes, and to the advancement of equality for women in everyday life.

SUMMARY OF ARGUMENT

In regard to the first question presented concerning the scope of judicial authority conferred by the ATCA, it is the purpose of this brief to elucidate the importance of the ATCA claim to ending impunity for perpetrators of sexual and gender violence and to enabling the federal courts to participate fully in the evolution and enforcement of customary international law.

Women are victims of the full range of traditionally recognized human rights violations such as summary

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[1] Letters of consent have been filed by the parties with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than *amici,* their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

execution, torture, arbitrary detention and enslavement. More frequently however, women suffer victimization through sexual and gender violence, atrocious crimes that have, until recently, been cloaked with impunity. Although rape and sexual abuse in war and other conflict situations have long been recognized as war crimes and as acts constitutive of crimes against humanity, this violence has rarely been prosecuted either internationally or nationally. In the last decade, wit the participation of the United States, customary international law has evolved in significant ways, making clear through state practice and judicial discernment of international law, including by the International Tribunals and the federal courts in ATCA cases, that rape and other sexual gender violence are core violations of customary international law.

Notwithstanding this clarification of customary norms, access to justice is very difficult for all marginalized groups and particularly so for women. Women seeking judicial redress suffer, in many contexts, lack of juridicial equality, lack of access to information and resources necessary to access justice, discriminatory, hostile, or insensitive methods of investigation, well-founded fear of retraumatization in the judicial process, danger of retaliation where perpetrators are powerful and they are unprotected, and the silencing effect of gender-based stigma and shame associated with sexual violence in all cultures.

These factors, together with the need to find legal assistance abroad and to serve the defendant in this country, combine to make ATCA cases the exception. Nonetheless, the ATCA is one among a number of growing national and international remedies which enables a small number of survivors to seek redress outside of their communities where there is no effective remedy. These cases do not only contribute to the healing of survivors of atrocities; each challenge to impunity for gender-based international crimes

gives hope to women throughout the world who cannot access justice, deters violations, furthers the possibility of gender equality, and gives meaning and force to the rule of law.

The ATCA also enables the federal courts to contribute to the international judicial discourse as to customary norms and under what circumstances they are violated and should be vindicated. While judicial decisions are a subsidiary source of international law, the careful discernment of international custom demanded under the ATCA, such jurisprudence has played a significant role in the clarification of customary norms since the widely recognized landmark *Filartiga* decision in 1980. Given that the international community has increasingly adopted the principle of an independent judiciary as a critical guarantor of democracy, it would be ironic and tragic if this Court were to relinquish the important role conferred upon the federal judiciary by Congress to discern and repair tortuous violations of international law, and thereby, to participate in the global dialogue concerning accountability for international wrongs.

Finally, to distort, as petitioners seek, the ATCA into a mere grant of jurisdiction and render it nugatory would signal a dangerous weakening of the commitment of this nation to ending gross violations and denying a safe haven form human rights violators. For women throughout the world, it would dash the hope engendered by even the remote possibility of accountability for international crimes against women. If the petitioners wish to curtain ATCA jurisdiction, their plea is appropriately addressed not to this Court but to Congress.

For these reasons, the decision of the Ninth Circuit Court of Appeals that the ATCA confers jurisdiction over claims constituting torts in violation of the treaties of the United States and law of nations should be affirmed.

ARGUMENT

POINT I. Though Long Condemned, Rape And Other Forms Of Sexual And Gender Violence Have Been Inflicted With Impunity.

In recent years, the terrible gravity and prevalence of gender violence and persecution have become priority issues for the international community and for this nation as has the addressing the impunity enjoyed by the perpetrators of these crimes.

A. Impunity For Violence Against Women Is Rooted In And Perpetuates Women's Inequality And Subordinate Status.

Rape, sexual mutilation, sexual humiliation, sexual slavery and forced pregnancy occur with alarming regularity in war and conflict situations. Women have long been treated as "booty" in war, the reward and fuel to keep soldiers fighting. During World War II, the Japanese army created "comfort stations" where approximately 200,000 women, and girls as young as twelve, were sexually enslaved and raped repeatedly.[2] Today, tens of thousands of women and girls are bought, abducted and deceived into sexual slavery and forced labor, serving militaries, corporations, and individuals.[3] Women are raped to destroy their health, their will, their social belonging and their reproductive capacity; they are also raped to humiliate male relations who are often forced to watch helplessly and to dominate and shatter the community.

[2] *Final Report on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, U.N. Commission on Human Rights, Subcommittee on the Protection of Human Rights, 50th Sess., Agenda Item 6, at 52, E/CN.4/Sub.2/1998/13 (1998) (Gay McDougall, Special Rapporteur) (hereinafter *McDougall, Contemporary Forms of Slavery).*

[3] *Id.*; *see also Recent Developments in U.S. Government Efforts to End Human Trafficking,* U.S. Department of State, Feb. 5, 2004, available at http://www.state.gov/g/tip/rls/fs/28548.htm.

Sexual violence is used to punish and subjugate women who embrace non-traditional political roles. Sexual violence has also been a part of genocidal strategies, to incite people to violence, to force women to bear the violators' children, and to destroy their reproductive capabilities. Their bodies are used as vessels to destroy their very own communities. Women have suffered the foreseeable consequences of pregnancy and infection with HIV/AIDS, and have been purposely infected as part of a genocidal policy.[4] One Tutsi woman recalls being told prior to being raped, "I have AIDS and I want to give it to you."[5]

In a 2003 resolution the United Nations' Commission on Human Rights stressed that violence against women occurs "within the context of de jure and de facto discrimination against women and the lower status accorded to women."[6] As Dr. Kelly D. Askin states, "women were considered 'property,' owned or controlled by men. . . . The rape of a woman was not considered a crime against her, but instead a crime against the man's property."[7]

> Due to women's subordinate status, sexual violence is often treated as a moral issue, and not a problem of violence. As women are viewed as bearers of morality, the classical

[4] *Report on the Situation of Human Rights in Rwanda*, U.N. Commission on Human Rights, 52nd Sess., Agenda Item 10, at 17, 20, U.N. Doc. E/CN.4/1996/68 (1996) (Rene Degni-Segui, Special Rapporteur).

[5] *Report of the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict*, U.N. Commission on Human Rights, 54th Sess., Agenda Item 9(a), at Part II., U.N. Doc. E/CN.4/1998/54/Add.1 (1998) (Ms. Radhika Coomaraswamy, Special Rapporteur).

[6] HCHR Res. 2003/45, *Elimination of Violence Against Women*, U.N. Hum. Rts. Comm., 59th mtg., at 8, U.N. Doc. E/CN.4/2003/L.11/Add.4 (2003).

[7] Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int'l L. 288, 297 (2003).

approach to rape and sexual violence presents a legal structure that is deeply suspicious of the victim.[8] Sexual violence is thus a tactic to terrorize women and make them vulnerable and dependent.[9]

B. Though Sexual Violence Has Long Been Recognized As War Crimes And Crimes Against Humanity, Impunity Has, Until Recently, Been The Practical Reality.

Before today, only the Lieber Code of 1863, an Order filed by the United States Secretary of War under President Lincoln during the Civil War, explicitly treated rape as a grave offense.[10] Subsequently, rape and sexual violence were implicit in other offenses or characterized in moralistic terms. The 1907 Hague Convention IV, Article 46 protected "[f]amily honour and rights[,]" and required that "the lives of persons . . . must be respected," which was understood to protect women from rape.[11] Sexual violence was likewise not enumerated in the London or Tokyo Charters creating the postwar International Military Tribunals at Nuremberg[12] and

[8] *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women*, U.N. Hum. Rts. Comm., 59th Sess., Agenda Item 12(a), at 18, U.N. Doc. E/CN.4/2003/75 (2003) (Ms. Radhika Coomaraswamy, Special Rapporteur).

[9] Michelle Jarvis, U.N. Division for the Advancement of Women, *Sexual Violence and Armed Conflict: United Nations Response*, Women2000 (1998), *available at* www.un.org/womenwatch/daw/public/w2apr98.htm (last visited Feb. 24, 2004).

[10] Kelly D. Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* 35-36 (1997).

[11] Convention Respecting the Laws and Customs of War on Land (Second Hague, IV), (18 Oct. 1907), 36 Stat. 2277, T.S. No. 539 (entered into force 26 Jan. 1910).

[12] The official documents of the Nuremberg Trial are contained in *Trial of the Major War Crimes Before the International Military Tribunal, Nov. 14, 1945 to Oct. 1, 1946* (1947).

for the Far East (IMTFE-Tokyo),[13] respectively. In Nuremberg, some evidence of sexual violence was received but not mentioned in the Judgment, and despite the naming of rape as a crime against humanity in the Allied Control Council Law No. 10, governing the remaining war crimes trials, there were no prosecutions.[14] In the IMTFE, because of the notoriety of the "rape of Nanking," the crime of rape was charged and formed the basis of convictions. At the same time, the most extensive system of military sexual slavery euphemistically identified as "comfort women" was untouched.

The codification of laws and customs of war in the four 1949 Geneva Conventions called for protection of women but did not make rape a grave breach or an explicit offense in international armed conflict; in non-international armed conflict, it was implicit as "outrages against personal dignity, in particular humiliating and degrading treatment."[15] The 1977 Protocol I to the Geneva Conventions pertaining to international armed conflict, reiterated the language of common article 3(1)(c) adding "enforced prostitution and any form of indecent assault."[16] Protocol II, applicable to non-

[13] Documents of the Tokyo Trial are reproduced in the *Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East* (R. Pritchard & S. Zaide eds., 1981).

[14] *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and against Humanity, Allied Control Council Law No. 10,* Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, (Jan. 31, 1946).

[15] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287, Art. 3(1)(c). *Compare* Art. 147 (grave breaches) *with* Art. 27 (protection against "any attack on their honour, in particular against rape, enforced prostitution, or any other form of sexual assault").

[16] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1331 (entered into force Dec. 7, 1978) Art. 76.

international armed conflict, added rape to its list of dignitary offenses.[17]

Despite this implicit and explicit legal condemnation of sexual violation against women, enforcement has been rare and impunity the practice. And although there have been legal advances, the obstacles to their enforcement create widespread impunity. To give impunity to gender-specific crimes is to support the underlying structures and unequal power relations between men and women and perpetuate the subordination of women. As the McDougall Report on Contemporary Forms of Slavery emphasized:

> [t]he right to an effective remedy is clearly essential in overcoming impunity and non-accountability for sexual slavery, rape and other acts of sexual violence in armed conflict, and the rights of victims of these atrocities must be vindicated and redressed.[18]

The ATCA is one small but critical step in the direction of ending impunity generally and to insuring that the United States does not become a haven of impunity in particular.

POINT II. The Recent Evolution Of International Law Has Made Clear The Consensus Of Nations That Rape And Other Forms Of Sexual Violence Are Among The Gravest Violations Of The Law Of Nations.

With respect to both human rights and humanitarian law, the 1993 Vienna Convention on Human Rights was a

[17] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) Art. 4(c).

[18] *Final Report on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, 50th Sess., Agenda Item 6, at 89, E/CN.4/Sub.2/1998/13 (1998).

watershed.[19] Recognizing the urgency of eliminating gender-based violence throughout the world, the Convention agreed:

> [v]iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery and forced pregnancy, require particularly effective response.[20]

Thereby, the World Conference set in motion the international and national machinery that has affirmed the acceptance by the community of nations, that rape and sexual violence, -- when committed by state actors, or by non-state actors as war crimes, crimes against humanity, genocide and slavery, -- are violations of customary international law.[21]

A. Gender-Specific Violence And Persecution Constitute Core Violations Of Customary Norms Of International Law.

Appalled by revelations of the widespread rape and sexual violence in armed conflict, the international community has made clear that these violations rank among the most serious of offenses under the treaties and laws and customs of war. Codifying the evolved customary norms, the Rome Statute of the International Criminal Court (ICC Statute) lists "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other forms of

[19] World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (12 July 1993) paras. 18, 37-44 (hereinafter *Vienna Conference*).

[20] *Id.* para. 38.

[21] Customary international law is formed by consistent state practice accepted as law (opinio juris). *See* ICJ Statute, art. 38, June 26, 1945, 59 Stat. 1055, 1060, U.S.T.S. 993.

sexual violence..." as both grave breaches and serious violations of the laws of war.[22] Although the United States has not ratified the Rome Statute, these crimes, applicable to international and non-international conflict alike, were viewed as reflecting customary norms and were adopted overwhelmingly, with the active concurrence of the United States, by the body of nations negotiating the ICC statute.[23] Despite the Bush Administration's "unsigning" of the ICC Statute, the State Department affirms that the "U.S. is emphatically committed to international accountability for war crimes, crimes against humanity and genocide."[24] This evolution is also reflected in the jurisprudence of the ICTY and the ICTR.[25]

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[22] Rome Statute of the International Criminal Court, 1998 Sess. arts. 8(2)(b)(xxii) and 8(2)(e)(vi) U.N. Doc. A/CONF.183/9 (1998) (entered into force July 1, 2002).

[23] The State Department Fact Sheet explains that the Bush Administration's "unsigning" was designed to free it to oppose the Court's jurisdiction over non-parties, the independent powers of the prosecutor, and the power of the Court to proceed without the consent of states or the Security Council, and not the normative status of the enumerated crimes. *See* DOS Fact Sheet at. http://www.state.gov/s/wci/fs/2002/9978.htm (last visited Feb. 26, 2004).

[24] *Id.*

[25] Statute of the International Criminal Tribunal for the Former Yugoslavia, Adopted 25 May 1993, (hereinafter "ICTY"), S.C. Res. 827, U.N. SCOR, 48rh Sess., 3217th mtg. At 29, U.N. Doc. S/827/1993 (1993). Statute of the International Criminal Tribunal for Rwanda 8 Nov. 1995 (hereinafter "ICTR"), S.C. Res. 955, U.S. SCOR, 49th Sess., 3453d mtg. At 15, U.N. Doc. S/INF/50 Annes (1994). While under Article 38(d) of the Statute of the International Court of Justice judicial decisions are classified as a "subsidiary means for the determination of rules of law," decisions grounded on judicial discernment of state practice and norms carry significant weight as evidence of international customary law.

[26] In signing the statute, President Clinton made clear his support of the norms and his doubts only about aspects of the enforcement mechanism itself. Likewise, in unsigning the statute, President Bush reaffirmed the support of the Administration for the prevention and punishment of the crimes contained in the statute.

Recent developments in the law of, and international jurisprudence interpreting, crimes against humanity also made clear that rape and sexual violence can constitute a crime against humanity when committed as part of a widespread or systematic attack on a civilian population.[27] The ICC Statute incorporates as crimes against humanity the same list of sexual violence as was crimes. Further it explicitly recognizes that the crime against humanity of persecution incorporates gender-based persecution which may occur independently or as part of an attack on national, ethnical, racial, or religious or other population targeted by persecution.[28]

B. Rape And Other Forms Of Sexual Violence Have Also Been Recognized As Torture, Enslavement And Genocide Under International Law.

There has also been widespread recognition that such violence constitutes other well-established customary violations, particularly torture, enslavement and genocide. This development is significant to underscoring the gravity of gender violence and to ensuring that it cannot again be marginalized or trivialized.

The recognition that rape and grave forms of sexual violence amount to torture has been consistently reaffirmed in numerous contexts contributing both to the interpretation of pertinent treaties and to customary international law.[29]

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[27] ICTY Statute, art. 5(g); ICTR Statute, art. 3(g); ICC Statute, art. 7(1)(g).

[28] ICC Statute 7(g), 7(h).

[29] *See Declaration Violence*, Art. 3(h); *CEDAW Recommendation No.19*, para. 7(b); *see also* Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, *adopted* July 17, 1998, Article 8 (2) (a) (xxii) which states that the sexual violence listed as "war crimes" "also constitut[e] a grave breach of the Geneva Conventions." Art. 8(2)(b)(xxvii) or, for non-international armed conflict, "a serious

Adjudicatory bodies have played a significant role. Rape and sexual violence have been held forms of torture in decisions by the ICTY and ICTR,[30] as well as in regional human rights commissions and courts in both custodial and non-custodial contexts.[31] Significantly, the *Kunarac* Appeals Chamber made clear that the torture element of "intentional infliction of severe physical or mental pain or suffering" is *per se* satisfied by rape.[32]

Rape and sexual violence may also constitute crimes of enslavement, forced labor and trafficking under international law. The McDougall Report, Contemporary Forms of Slavery, identifies a range of enslavement practices, including sexual slavery.[33] The ICC Statute codified, for the first time, the crime of "sexual slavery" as both a war crime and a crime against humanity,[34] and the ICTY recognized that detention, rape and sexual violence constituted enslavement under international law.[35]

Rape and forced pregnancy have also been recognized as acts of genocide. Genocide consists of a specified list of acts when "committed with the intent to destroy, in whole or

violation of article 3 common to the four Geneva Conventions," art. 8(2)(e)(vi).

[30] *Prosecutor v. Furundzija,* Case No. IT-95-17/1-T (ICTY July 16, 1998) para. 163 (Trial Judgement) (rape in detention and interrogation); *Prosecutor v. Delalic,* Case No. IT-96-21 (ICTY Mar. 21, 1996) (repeated forced anal and vaginal intercourse); *Prosecutor v. Akayesu,* Case No. ICTR-96-4-T (Trial Judgement) (ICTR Sept. 2, 1998) (analogizing rape and torture).

[31] *Aydin v. Turkey,* Eur. Ct. H.R. 25/09/1997, *Mejia v. Peru,* Case 10.970, Inter-Am, C.H.R. 157, OEA/se L/V/II 91, doc. 7 rev. (1996).

[32] *Kunarac,* Trial Judgement, paras. 150-51.

[33] Ms. McDougall, Contemporary Forms of Slavery, paras. 27-33.

[34] *See,* e.g. *ICC Statute,* Art. 7(1)(g)(crimes against humanity and 8(2)(b)(xxii) and 8(2)(e)(vi)(war crimes in international and non-international armed conflict). mon to the four Geneva Conventions."

[35] *Kunarac,* Trial Judgement, paras. 542-43; Appeal Judgement, para. 119.

in part, a national, ethnical, racial or religious group as such."[36] In the Trial Chamber's landmark decision in *Akayesu*, the ICTR recognized rape and other sexual violence, including forced pregnancy, as acts of genocide.[37] This holding was subsequently incorporated by the ICC Statute.[38]

In addition, the role of gender-specific propaganda, urging sexual violence and casting women as demons and traitors, has been recognized as contributing to genocide.[39]

C. Forced Disappearance Has Evolved Recently As An International Violation Encompassing As An Element The Suffering Of Those Left Behind Who Are Disproportionately Women.

Enforced disappearance as an independent international crime has likewise evolved in the recent decades.[40] The multiple harms of forced disappearance were

[36] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., Annex, U.N. Doc S25704 (1993), (hereinafter *ICTY Statute*), Such acts include not only killing but also "causing serious bodily or mental harm to members of the group," "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;" and "imposing measures intended to prevent births within the group. Convention on the Prevention and Punishment of Genocide, *ratified by the U.S* Nov. 25, 1988, 78 U.N.T.S. 277 (hereinafter *Genocide Convention*), Art. II. *See also,* ICTY Statute, art. 4; ICTR Statute, art. 2; and ICC Statute, art. 6.

[37] *Akayesu,* Trial Judgement, para 731.

[38] *See, e.g.* ICC Statute, Elements Annex, Article 6(b) n.3 (causing serious bodily or mental "may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment").

[39] *Akayesu,* Trial Judgement, para. 422; *id.* at para. 452.

[40] Inter-American Convention on Forced Disappearance of Persons, adopted in 1994 by the G.A. of the O.A.S; *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(c) (1987) (includes disappearance as a violation of the international law of human rights); *Annual Report of the Inter-American*

brought to the world's attention by the Madres de la Plaza de Mayo in Buenos Aires, Argentina, a courageous group of women who demonstrated on a weekly basis and demanded information and the return of their loved ones. The crime of forced disappearance constitutes not only "the abduction by state officials or their agents" but also the subsequent "official refusal to acknowledge the abduction or to disclose the detainee's fate."[41] The crime thus recognizes the impact of "anguish and sorrow" on the disappeared person's family, an impact that falls heavily on women, who often remain as heads of households.[42] Forced disappearance is thus an example of a newly evolved customary violation that recognizes the gravity of women's suffering and responds to new challenges to human rights.

Commission on Human Rights, Organization of American States, AG/Res. 666 (XIII-0/83) (1983) (denouncing disappearance as "an affront to the conscience of the hemisphere and...a crime against humanity").

[41] *Forti v. Suarez-Mason*, 694 F.Supp. 707, 711 (N.D. Cal. 1998) (finding "the existence of a universal and obligatory international proscription of the tort of "causing disappearance").

[42] *See* Draft International Convention on the Protection of All Persons from Enforced Disappearance, art. 24, para. 3 (19 August 1998) at E/CN.4/Sub.2/1998/19 (defining "victims of the offense" to include persons who have a "direct relationship" with the disappeared and recognizing that the scope extends at least to the disappeared person's "relatives, and any dependent who has a direct relationship to him or her"); *see also* Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133 (1992) (as interpreted by the G.A. in its 92nd plenary meeting, 18 December 1992 at A/RES/47/132 recognizing the "anguish and sorrows caused by those disappearances..." to the "the families concerned, who are unsure of the fate of their relatives").

1. United States Courts, Adjudicating ATCA Cases, Have Contributed To And/Or Incorporated These Developments.

The foregoing international developments have been either presaged or been followed by federal courts as well as supported by successive United States administrations. Federal courts have recognized that rape is a form of torture[43] and that rape and torture are *jus cogens* violations actionable under the ATCA regardless of state participation when such acts are committed in furtherance of war crimes[44] or genocide.[45]

Several ATCA cases have recognized enslavement torts: trafficking and involuntary servitude in *Topo v. Dhir*, a case brought by an immigrant domestic worker,[46] forced labor in *In re World war II Era Japanese Forced Labor Litigation*[47] and *Doe v. Unocal*,[48] slavery in *Ahmed v.*

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[43] *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995); *Doe v. Unocal*, 2002 U.S. App. LEXIS 19263, 30-31(9th Cir. 2001) vacated by, rehearing, en bank, granted by, 2003 U.S. App. LEXIS 2716, 2003 Cal. Daily Op. Service 1388, 2003 D.A.R. 1815 (9th Cir. Feb. 14, 2003). *Id.*, 28 citing *Farmer v. Brennan*, 511 U.S. 825 (1994) (Blackmun, J., concurring) (describing brutal prison rape as "equivalent of" and "nothing less than torture."); *In re Extradition of Suarez-Mason*, 694 F.Supp. 676, 682 (N.D. Cal. 1988) (stating that "shock sessions were interspersed with rapes and *other forms of torture*"(emphasis added in Unocal)).

[44] *Karadzic*, 70 F.3d at 242 (2d Cir. 1995).

[45] *Karadzic*, 70 F.3d at 242 (rape, forced impregnation, and other forms of torture "designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats" pled acts of genocide) *Doe v. Unocal*, 2002 U.S. App. LEXIS 19263, 30-31(9th Cir. 2002).

[46] *Topo v. Dhir*, 2003 U.S. Dist. LEXIS 21937, *13-14 (S.D.N.Y 2003).

[47] *In re World War II Era Japanese Forced Labor Litig.*, 164 F.Supp. 2d 1160, 1179 (N.D. Cal. 2001) (recognizing forced labor claim under ATCA but finding plaintiffs' claim was time-barred).

[48] *Doe v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263, *32-34 (9th Cir. 2002), vacated by, rehearing, en bank, granted by, 2003 U.S. App. LEXIS

Hoque.[49] The federal courts have also participated in the recognition of forced disappearance as a violation of customary international law.[50]

POINT III. The ATCA Enables the Federal Courts to Contribute to the Global Process of Evolving International Customary Norms as well as Preserves the Role of the United States Courts as a Bulwark Against Impunity

ATCA assures a forum in United States federal court for aliens who have suffered in tort for violations of international law. In so doing, ATCA represents one of a growing number of national and international remedies and assures that the United States is a bulwark against the widespread impunity for gender crimes discussed above. Functionally, ATCA plays two important roles in combating the impunity. First, and most directly, ATCA provides a direct claim under the developing international norms where all of the other jurisdictional requisites are met. Second, claims brought under ATCA in United States courts assure that the United States judiciary will continue its vital contributions to the development and implementation of customary international law and to ending impunity for grave violations.[51]

2716, 2003 Cal. Daily Op. Service 1388, 2003 D.A.R. 1815 (9th Cir. Feb. 14, 2003).

[49] *Ahmed v. Hoque*, 2002 U.S. Dist. LEXIS 14852, *22-23 (S.D.N.Y 2002) (recognizing individual liability for violation of international norms prohibiting slavery but dismissing plaintiff's claim on grounds of diplomatic immunity).

[50] *Forti v. Suarez-Mason*, 694 F.Supp. 707, 711 (N.D. Cal. 1998).

[51] While ATCA is not the exclusive grounds upon which litigants may bring claims under international law, *see e.g.* Torture Victim Protection Act, 28 U.S.C. Sec. 1350 note, and Trafficking Victims Protection Act, 22 U.S.C. Sec. 7101, ATCA is the most comprehensive and adaptable in light of the developing international norms and new challenges to human rights.

A. This Court Should Not Permit The United States To Become A Haven Of Impunity For Those Who Have Committed Rape And Other Sexual Violence In Violation Of International Law

Impunity for claims under international law is inconsistent with both international law and settled United States law. From the time of the drafting and ratification of the Constitution to the present, the law of nations has been considered to be part of the common law of the United States.[52] As with the common law itself, the evolving scope and content of the law of nations is incorporated into the law of the United States.[53] Moreover, in enacting the Torture Victim Protection Act in 1992, 28 U.S.C. Sec. 1350 note, Congress affirmed both the recent application of the ATCA to human rights violations based on the holding in *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), and that the evolving norms of international law are incorporated into United States law.[54]

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[52] *See* Brief of Professors of Federal Jurisdiction and Legal History As *Amici Curiae* in Support of Petitioner, Sec. II.A. *See e.g. United States v. Smith,* 18 U.S. 153, 161 (1820) (referring in parentheses to law of nations as "part of the common law"). *See also The Paquete Habana,* 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions depending upon it are duly presented for their determination.").

[53] *See e.g. The Paquete Habana,* 175 U.S. at 686-711 (Court examined sources of international law, including the practice of nations in the years following the ratification of the United States Constitution through the late nineteenth century, to determine that norm had ripened protecting coastal fishing vessels from confiscation by warring navies).

[54] The legislative history of the Torture Victim Protection Act states "[TVPA] claims based on torture or summary executions do not exhaust the list of actions that may be appropriately covered by [ATCA] section 1350. That *statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of*

Impunity is contrary to the general rule that courts should hear the claims properly before them. As this Court stated in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409 (1990), "[C]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."

While in limited circumstances courts may invoke certain prudential doctrines – such as the act of state, sovereign immunity, political question or forum non-conveniens, these doctrines are closely circumscribed so as not to unduly restrict the rights of claimants to seek justice. As a plurality of this Court stated in *First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 756, 763 (1972), "The act of state doctrine represents an exception to the general rule that a court of the United States, where appropriate jurisdictional standards are met, will decide cases before it by choosing the rules appropriate for decision from among various sources of law, including international law." Similarly, as to the political question doctrine, "[o]ne of the Judiciary's characteristic roles is to interpret statutes, and [courts]cannot shirk this responsibility merely because [the] decision may have significant political overtones." *Japan Whaling Association v. American Cetacean Society,* 478 U.S. 221, 230 (1986). Except in those specific instances in which these prudential doctrines may apply, tort claims brought alleging violations of the law of nations fall well within the competencies of the judiciary and should be heard.[55] To

customary international law." H.R. Conf. Rep. 102-367, pt. 1 (1991). P.L. 102-256, Torture Victim Protection Act of 1991 H.R. No. 102-367(I), 85, November 25, 1991 (emphasis added).

[55] *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 428 (1964) ("It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a

decline to exercise its rightful authority is contrary to this nation's historic commitment to remedying wrongs and countering impunity.

B. Through Its ATCA Jurisprudence, As Well As Other Cases Concerning International Law, The United States Judiciary Makes An Important Contribution To The Evolution Of Customary International Law.

ATCA and related decisions by federal courts have contributed to the development of customary international law, specifically in the definition and requirements of serious crimes that particularly affect women, such as rape, torture, slavery-like practices and genocide. To convert ATCA into a mere jurisdictional grant as petitioners claim and require Congressional authorization for each substantive violation would inappropriately tie the hands of this Court and forfeit its potential leadership role in the discernment and enforcement of international law. As international law is also the law of the United States, this Court should be particularly wary of eliminating the role of the federal judiciary in the evolution of norms under international law.

International Tribunals and national courts abroad have relied on United States courts' interpretations of international law in cases brought under ATCA. *See, e,g,, Furundzija,*[56] relying in part on the Second Circuit's decision in *Filartiga* and on five other ATCA cases for the proposition that torture violates a *jus cogens* norm;[57] *Kunarac,* relying on *Karadic*, 70 F.3d at 243-44, that where torture and rape are

principle not inconsistent with the national interest or with international justice."); *c.f. Japan Whaling Assoc.,* 478 U.S. at 230 (it nevertheless is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance") (*citing Baker v. Carr,* 369 U.S. 186, 211 (1969)).

[56] *Prosecutor v. Furundzija*, IT-95-17/1-1, Trial Judgment at para. 147.

[57] *Id.*, para 153, n. 170.

committed in furtherance of war crimes and genocide, liability attaches to non-state actors.[58]

The European Court of Human Rights (ECHR) also examined ATCA decisions in relation to whether sovereign immunity should bar a torture claim filed in the United Kingdom against the government of Kuwait.[59] In its decision, the ECHR noted that foreign courts, including in ATCA decisions, granted immunity when plead in most civil cases.[60] In 1998, when Spain requested the extradition of Augusto Pinochet, the United Kingdom's House of Lords also consulted nine ATCA decisions on the issue of sovereign immunity in suits alleging violations of customary international law among other materials.[61] The U.S. was noted for its frequent grant of immunity in suits alleging violations of customary norms.

Further, as noted above, United States Courts under ATCA have contributed very specifically to the discernment and evolution of customary international norms against gender violence, as well as other evolving norms such as forced disappearance which have a disproportionate impact on women. Petitioners' argument that the Court should abdicate its historic role, authorized and reaffirmed by Congress, subject to Congress' revising authority, threatens its ability to shape the direction of international law.

[58] *Prosecutor v. Kunarac,* (Trial Judgment at para. 470 (i)).
[59] *Case of Al-Adsani v. The United Kingdom*, App. No. 35763/97. (Judgment, Strasbourg 1997).
[60] *Id.* Para. 23.
[61] *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte*, [2001] AC 6.

POINT IV. The Significance Of ATCA Is Heightened Given That Persistent Obstacles Prevent Women, And In Particular Victims Of Sexual Violence From Accessing Justice

It was not until October 1997 that, for the first time in history, a woman took the stand to testify to her experience as a victim of sexual violence before an international criminal tribunal.[62] Three years later, in August 2000, Bosnian Muslim women presented the first testimony of captivity, rape and torture in an ATCA suit.[63]

Victims of human rights violations in general face risks to themselves and their loved ones and suffer multiple legal, economic, social, cultural and psychological barriers to obtaining justice particularly in their own countries.[64] At the same time, virtually everywhere, women face heightened and additional barriers to prosecuting sexual violence crimes as a result of the persistence of gender-based discrimination and subordination. Not surprisingly, the World Health Organization found that the "vast majority of rapes worldwide go unreported."[65]

[62] Radhika Coomaraswamy, Third Minority Rights Lecture at Hotel Intercontinental, Geneva (May 25, 1999)available at http://www.sacw.net/Wmov/RCoomaraswamyOnHonour.html (last visited Feb. 25, 2004).
[63] John Sullivan, Bosnian Woman, Describing War Ordeal, Faints in U.S. Court, N.Y. Times, August 2, 2000, §A, at 3.
[64] In applying to ATCA cases the ten-year statute of limitations Congress provided in the Torture Victims Protection Act, one court noted that "ACTA plaintiffs confront obstacles not generally present in state tort and wrongful death suits: difficulties of gathering evidence sufficient to support a complaint; unavailability or hesitation of witnesses who may fear reprisal by a corrupt regime; [and] other delays caused by ongoing human rights violations." *Wiwa v. Royal Dutch Petroleum & Shell,* 2002 U.S. Dist. LEXIS 3293, at *61 (S.D.N.Y., Fev. 28, 2002).
[65] World Health Organization, World Report on Violence and Health (2002).

Discriminatory attitudes have shaped municipal legal norms and procedures and thereby women's expectations of justice.[66] Traditional societal and legal hostility to sexual violence claims conditions women not to seek or expect justice for sexual violence crimes and carries over into conflict and post-conflict situations as well. While developments in the International Criminal Tribunals have begun to remove some of the most discriminatory evidentiary requirements,[67] the legacy of long-standing discrimination is tenacious. Based on a special mission to examine the

[66] Special Rapporteur, Ms.Gay J. McDougall reports:

> gender-based discrimination [is]codified in criminal laws and justice systems around the world: rape and other forms of sexual assaults that are defined as crimes against the community and not against the individual victim, even though non-sexual assaults are defined as crimes against the individual victim; rape being defined as acts committed by a man against a woman (not his wife), even though men are also victims of sexual violence; ...evidentiary laws which accord less weight to evidence if presented by a woman; evidentiary laws in rape and sexual assault cases which require women to provide corroborating testimony from men; substantive laws which provide that a married woman who is unsuccessful in proving that she was raped can then be charged with adultery; penalties for sexual violence which allow a man convicted of rape to avoid punishment if he marries the victim.

Final Report on Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict, UN Commission on Human Rights, Sub-Committee on the Prevention of Discrimination and Protection of Minorities, 50th Sess., Prov. Agenda Item 6, at 95, 96, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) [hereinafter *McDougall, Contemporary Forms of Slavery*].

[67] See ICTR, Rules of Procedure and Evidence, Rule 96, U.N. Doc. IT/32/Rev.20 (2001); ICTR Rules of Procedure and Evidence, Rule 96, U.N. Doc. ITR/3/REV.1 (1995), & International Criminal Court Statute, Rules of Procedure and Evidence, Rule 70, U.N. Doc. PCNICC/2000/1/Add.1 (2000).

operations of the ICTR, Ms. Radhika Coomaraswamy, the UN Special Rapporteur on Violence Against Women found that the investigative and prosecutorial staff was primarily male and inadequately trained[68] and failed to pro-actively investigate sexual violence on a par with other crimes, resulting in the fact that despite massive sexual violence, few cases came to the Prosecutor's attention.[69]

Such factors are widespread and cause women to fear being treated dismissively or being retraumatized in the legal process. Cultural barriers may heighten the problem and ill-trained judges may fail to enforce the rules against abusive and impermissible questioning.

Women also keep acts of violence against them secret out of fear of retaliation and further acts of violence by perpetrators, armed groups, and even communities and families.[70] Revealing sexual violence is life-threatening even in non-conflict situations. Many women cannot afford the risk of revealing their identities to defendants especially where the perpetrators are local officials or where the perpetrators belong to the same community. Despite rules requiring confidentiality, a U.N. study notes that "judges have taken little or no action to prevent and punish the copying of confidential court transcripts, which have been sent back to the communities where the widows are living among the killers. A number of women in the ICTR paid

[68] *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, Addendum Report of the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict, U.N. Commission on Human Rights, 54th Sess., Prov. Agenda Item 9(a), at 4, U.N. Doc. E/CN.4/1998/54/ Add.1 (1998) [hereinafter Coomaraswamy, *Mission to Rwanda*].

[69] Coomaraswamy, *Mission to Rwanda*, p. 11, para. 5.

[70] Elisabeth Rehn & Ellen Johnson Sirleaf, Women, War and Peace: The Independent Expert's Assessment of the Impact of Armed Conflict on Women and Women's Role in Peace-building 17 (2002) para. 95.(hereinafter, *Women War and Peace*).

with their lives."[71] Such conditions may make it impossible for women to press charges locally especially when victim/witness protection programs are non-existent, inadequate or inappropriate.[72]

Breaking silence and seeking justice for sexual violence may also risk violence at the hands of family members. Women in every society fear being punished, or stigmatized as immoral or "ruined property" and thus may blame themselves for their victimization. A major non-governmental study of the problems in prosecutions for sexual violence concluded: "In patriarchal societies, rejection from a husband or potential marriage . . ., can be a matter of life and death for the victim. Becoming an outcast means the demise of her social network and near insurmountable challenges in building a future."[73]

Social and cultural isolation exacerbates health problems resulting from sexual violence. Some women must grapple with the horror of pregnancy or infection with HIV/AIDS resulting from rape, while others with destruction of their capacity to enjoy their sexuality or bear children.[74] Many women are enervated by severe and often suicidal depression, psychosomatic pain and illness, and perceived loss of identity.[75]

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[71] *Women War and Peace*, para. 95.

[72] Coomaraswamy, *Mission to Rwanda*, p. 12, para. 8. In the ICTR, the "[Victims Witness Protection Unit] suggested that special schemes for the most threatened witnesses to be relocated outside Rwanda should be explored and the international community has not responded. Fear about immigration formalities coupled with financial implications and the security of the people involved were cited as possible reasons for such reluctance." Coomaraswamy, *Mission to Rwanda*, p.13, para. 12.

[73] Voices From The Field: About Prosecution Of Sexualized Violence In An International Context 28 (Linda Ohman, ed. 2004) (hereinafter *Voices From The Field*).

[74] Coomaraswamy, Mission to Rwanda, p. 16, para. 2.

[75] *Id.* at 17, para. 2.

While the failure to prosecute is often attributed to and justified on the basis of victims' shame and fear, this is the consequence not of personal weakness or failing but of continuing discrimination and subordination. The availability of justice is a partial but crucial means of breaking the cycle of silence and despair.

A. Access To Justice For Victims Of Customary International Violations Is Critical To Women's Healing And Empowerment And To Deterring Such Crimes As Well As Advancing The Equality Of Women.

Despite all these risks, women are increasingly seeking to participate in justice. A support officer of the ICTY Victims and Witnesses Unit provided several reasons: "To speak for the dead, to look for justice in the present, to help the truth be known by the world; in the hope that such crimes can be prevented in the future."[76] A young woman in Rwanda complained to a field officer that many of the perpetrators were in exile.

> It is as if they are being rewarded for the crimes they committed. They deserve to be punished. And what is happening to us here? We have been reduced to suffering, begging and misery. It is as if we are the guilty ones. We would like you to be a voice for us, by asking the United Nations and the international community for justice. Then we can rebuild our lives.[77]

These statements underscore the importance of access to justice. As Mr. Theo Van Boven, the Special Rapporteur on the right to reparation for victims of gross violations of human rights and humanitarian law noted, "all victims of

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[76] Women, War & Peace, para. 95.

[77] *Id.*

serious violations of international law have a right to fair and adequate reparations, which shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations."[78]

For women, the ability to break silence around crimes of sexual violence and shift the burden of responsibility and shame to the perpetrators where it properly belongs, has additional significance. It is a vehicle through which women can restore their dignity and reclaim their rightful place in their communities.

> By making a public complaint or accusation, the survivor defies the perpetrator's attempt to silence and isolate her, and she opens the possibility of finding new allies. When others bear witness to the testimony of a crime, others share the responsibility for restoring justice.... [A]s in the case of private, family confrontations, the survivor draws power from her ability to stand up in public and speak the truth without fear of the consequences. She knows that truth is what the perpetrator most fears. The survivor also gains satisfaction from the public exercise of power in the service of herself and others.[79]

Challenging impunity throught justice is also essential to the elimination of gender-based discrimination and to building a sound foundation for peace and true democracy. As the UNIFEM Report concludes:

> Accountability on the part of the states and societies for crimes against women means more than just punishing perpetrators. It means establishing the rule of law and a just

[78] McDougall, Slavery-Like Practices, 88.
[79] Judith Lewis Herman, *Trauma and Recovery,* 210 (Basic Books, 1997).

> social and political order. Without this, there can be no lasting peace. Impunity weakens the foundation of societies emerging from conflict by legitimizing violence and inequality. It prolongs instability and injustice and exposes women to the threat of renewed conflict.[80]

Congress has wisely and clearly given the federal courts power to hear torts in violation of the evolving law of nations under ATCA. In so doing, it has authorized the federal courts to participate in the global discourse on customary international law and to be a bulwark against impunity for perpetrators who make it to this country.

Globally, we are living in a time of evolving challenges to human rights and multiplying remedies for violations of customary international law internationally and in nations around the globe. For this Court to nullify this Act of Congress would not only usurp the prerogative of Congress and cabin the Court's proper role; it would also remove a significant means of deterring and detecting perpetrators, strengthening the rule of law, and providing long-overdue redress to women who have been not only victimized by gender violence but also by the impunity its perpetrators have heretofore enjoyed.

[80] Women, War & Peace, para. 89.

CONCLUSION

Wherefore, the *amici curiae* urge this Court to reject petitioners' effort to nullify the ATCA and affirm the decision of the Ninth Circuit below.

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In The Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE CENTER FOR JUSTICE AND ACCOUNTABILITY, NATIONAL CONSORTIUM OF TORTURE TREATMENT PROGRAMS, AND INDIVIDUAL ATCA PLAINTIFFS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

This suit raises the question of whether survivors of grave violations of customary international law will be foreclosed from bringing civil actions against their perpetrators under the Alien Tort Claims Act ("ATCA"), 28 U.S.C.A. §1350, a statute enacted over 200 years ago, which has provided the crucial opportunity for survivors to seek justice. *Amici curiae* are committed to preserving the ATCA as a potential avenue for survivors of egregious violations of customary international law to seek redress in U.S. courts.

Amici curiae include individual survivors of gross human rights violations who have filed suit against their abusers under the ATCA as well as organizations dedicated to serving survivors of torture and other acts of severe violence, listed in Appendix A.

This case will determine whether a key avenue for obtaining a measure of justice for victims of international atrocities – including genocide, crimes against humanity, war crimes, slavery, arbitrary detention, and disappearances – will remain available. As survivors of these abuses and organizations that provide counseling and other forms of assistance to those injured by these horrors, *amici curiae* have a vital interest in the outcome of this case.

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written by counsel for *amici curiae* with the assistance of Adam Day, Catherine Meza, and Volinka Reina, students at the University of California (Boalt Hall). No person or entity other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae*. Petitioner's letter of consent has been lodged with the Court. The letter of consent of the United States accompanies this brief.

SUMMARY OF ARGUMENT

Our purpose in submitting this brief is to offer our perspective based on our first-hand experience as survivors of violations of customary international law and organizations of professionals who assist such survivors. We hope to enlarge the discussion on the merits to include the unique and profound implications which the pursuit of justice through ATCA suits has exerted on the survivors of unimaginable horrors and on their communities.

Amici curiae have experienced the enormous challenges survivors of serious violations of customary law face. Their injuries endure for years – if not for life – often exacerbated by a sense of powerlessness and injustice that the perpetrators are living in the United States with impunity. ATCA cases have provided a judicial remedy consistent with international law principles that enables survivors to break the silence surrounding their abuses, to restore their dignity and sense of control over their lives by securing judicial acknowledgment of the horrors they endured, and to achieve a measure of justice against those responsible for their suffering.

The ATCA is the only judicial remedy available for mass and systematic violations such as genocide and crimes against humanity, as well as for war crimes, slavery, arbitrary detention, religious persecution, and other egregious atrocities. In addition, ATCA suits promote the U.S. interest to hold perpetrators of gross human rights violations accountable. ATCA litigation helps U.S. officials identify and remove wrongdoers present in the country illegally and may stimulate anti-impunity and more general rule of law efforts in the countries from which the abusers came. *Amici curiae* urge the Court to maintain the opportunity for survivors to benefit from the critical effects on individuals and communities that the ATCA's judicial remedy affords.

ARGUMENT

I. The ATCA Is Consistent with the Well-Recognized Principle of International Law that States Are Obligated to Provide a Remedy for Gross Human Rights Violations.

The ATCA promotes enforcement of human rights norms and is consistent with the obligation of states under international law to provide a remedy for gross human rights violations.[2] The United States has supported the

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[2] For example, the Universal Declaration of Human Rights, article 8, provides "a right to an effective remedy by the competent national tribunals for acts violating . . . fundamental rights." Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). In addition, article 2(3) of the International Covenant on Civil and Political Rights requires states "to develop the possibilities of judicial remedy," and "to ensure that the competent authorities shall enforce such remedies when granted," and article 9(5) specifically states that "[a]nyone who has been the victim of an unlawful arrest or detention shall have an enforceable right to compensation." G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. The United States has ratified the Covenant. U.S. Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2003*, at 294 (2003). Moreover, the U.N. Special Rapporteur on Reparations has proposed that every state provide a remedy to victims of gross human rights violations. United Nations, Economic and Social Council, Commission on Human Rights, The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission Resolution 1999/33, annex, art. 2 at 7, U.N. Doc. E/CN.4/2000/62 (2000). The Proposed Guidelines, to be considered at the 60th session of the Commission on Human Rights, establish reparation norms including that, in establishing remedies for victims of gross human rights violations or serious violations of humanitarian law, states "shall ensure that their domestic law is consistent with their international obligations" and that victims "shall have effective access to a judicial remedy." United Nations, Economic and Social Council, Commission on Human Rights, The Right to a

(Continued on following page)

international trend to develop mechanisms to hold accountable those who violate these most basic norms. In the aftermath of World War II, the United States was a key participant in the trials of Nazi war criminals in Nuremberg and Japanese war criminals in Tokyo. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 1-9 (2d ed. 1999).

More recently, in the early 1990s, the United States assumed an active role in creating the *ad hoc* International Criminal Tribunal for the Former Yugoslavia to try individuals suspected of genocide, war crimes, and crimes against humanity in the Balkan conflict. Virginia Morris & Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* 30-35 (1995). It also supported the creation of the International Criminal Tribunal for Rwanda to prosecute individuals suspected of participation in the 1994 genocide in that country. Human Rights Situation in Africa: Hearing Before the Subcomm. on Africa of the House Comm. on Int'l Relations, 104th Cong. 44-53 (1995) (written testimony of the Hon. John Shattuck, Ass. Sec. of State, Bureau of Democracy, Human Rights and Labor).

The ATCA enables the United States to promote accountability for prescribed categories of universally condemned practices by offering survivors the opportunity to file tort actions against those of their abusers who are subject to the jurisdiction of U.S. courts. As the Second Circuit concluded in its landmark *Filártiga v. Peña-Izala*, 630 F.2d 876, 890 (2d Cir. 1980) case: "Our holding today,

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Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law: Note by the High Commissioner for Human Rights, Appendix I: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights Law and [Serious] Violations of International Humanitarian Law (Rev. 24 Oct., 2003), art. 2, at 19, and art. 13, at 22, U.N. Doc. E/CN.4/2004/57 (2004).

giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." *Filártiga*, 630 F.2d at 890. By the same token, the abandonment of the ATCA would constitute a giant step backward from the realization of this ageless dream and run counter to Congressional intent to promote accountability.

When Congress adopted the Torture Victim Protection Act (affording a private right of action for aliens and U.S. citizens tortured or summarily executed by an individual acting under actual or apparent authority or color of law of any foreign nation), it explicitly retained the ATCA as an avenue for redress for a *broader range* of violations:

> [TVPA] claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [ATCA] section 1350. Consequently, that statute should *remain intact* to permit suits based on other norms that *already exist or may ripen in the future* into rules of customary international law.

Torture Victim Protection Act [hereinafter TVPA] of 1991, H.R. Rep. No. 102-367(I), at 85 (1991) (emphasis added) [hereinafter House Report]. The Restatement (Third) of Foreign Relations Law recognizes several violations of customary international human rights law not specifically included in the TVPA including genocide, slavery, disappearance, and crimes against humanity. Restatement (Third) of Foreign Relations § 702 (1986).[3] Several ATCA

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[3] Customary international law norms have been construed narrowly by U.S. courts to cover only "well-established, universally recognized norms of international law." *Filártiga v. Peña-Irala*, 630 F.2d 876, 881, 888 (2d Cir. 1980); *accord Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

plaintiff *amici* successfully have held their perpetrators accountable under the statute for these customary international law violations, which they would not have been able to do under prevailing interpretations of the TVPA. The ATCA therefore plays a continuing and vital role in U.S. leadership in promoting justice for gross human rights abuses and in enabling the United States to fulfill its obligations under international human rights law.

II. ATCA Plaintiffs Would Be Foreclosed from Seeking Justice for Customary Law Violations if the Court Determines that the ATCA Does Not Create a Private Right of Action.

To illustrate the ATCA's impact and importance, we provide the following examples of *amici* survivors who have secured relief under the statute. These survivors suffered injury and loss during prolonged campaigns of widespread terror. Many of the abuses they endured violate several fundamental norms of treaty and customary international law, and violation of one norm may facilitate violation of another. For example, *amici* include family members of victims who were extra-judicially killed after being tortured, some of whom were victims of widespread campaigns later found to be crimes against humanity. Other *amici* have survived torture, often committed in *incommunicado* conditions fostered by arbitrary detention. One *amica* was a plaintiff in an ATCA suit in which torture was a constituent act of genocide because it was carried out as part of a plan to obliterate the Bosnian Muslim population.

The following accounts of *amici*, ATCA plaintiffs, depict the array and brutality of human rights violations addressed by the ATCA, many of which would be without remedy if this court were to determine that the statute does not provide a private right of action.

A. Torture: Dolly Filártiga.

In 1976, Dr. Joel Filártiga operated a clinic for poor country people in Paraguay and was a leading opponent of President Alfredo Stroessner, who had held the country in the grip of a brutal dictatorship since 1954. *Filártiga*, 630 F.2d at 878. He and his family, including his 17-year-old son Joelito and his 20-year-old daughter Dolly, lived near Americo Norberto Peña-Irala, the Inspector General of Police of Asuncion, the capital of Paraguay. *Id.*

On March 29, 1976, Joelito was kidnapped by Peña and others and brought to a police station downtown where he was subjected to electric shocks and other forms of torture, resulting in his death. *Id.* His body was then brought to Peña's home, to which Dolly was summoned to view her brother's remains. *Id.* When Dr. Filártiga subsequently brought a criminal action in Paraguay against Peña for the murder of his son, his lawyer was arrested, "shackled to a wall" and eventually disbarred. *Id.*

Amica Dolly Filártiga arrived in the United States in 1978. On April 6, 1979, she and her father sued Peña, who was living in Brooklyn, New York, in the Eastern District of New York under the ATCA. Initially dismissed, on appeal the Second Circuit held that courts must interpret international law not as it was in 1789, when the statute was enacted, but as it is today; that the law of nations forms part of the law of the United States; and that where the nations of the world have demonstrated that when a particular wrong is "of mutual, and not merely several, concern" that wrong becomes an international law violation within the meaning of the ATCA. *Id.* at 884, 888. The district court awarded the family damages of over $10 million. *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

Amica Filártiga became a U.S. citizen and now lives in New York with her husband Diego and her daughter Paloma. She will never forget the March night of 1976 when they dragged her to Peña's house to see her brother's mutilated body. Although she has yet to collect any of the

damages award, she is grateful that justice was done and proud that her name has gone down as marking a giant step forward in the annals of international human rights law. "There's no amount of money that can be put on the price of pain," she remarked. To *amica* Filártiga "[t]he suit is important only as a victory for [the] people of the world." Beverly Beyette, *A 6-Year Quest for Justice*, L.A. Times, Apr. 28, 1982, at 6.

B. Disappearance: Zenaida Velásquez.

Amica Zenaida Velásquez is the sister of Manfredo Velásquez Rodriguez, who was abducted and "disappeared" – taken into custody by state agents who subsequently denied knowledge of his whereabouts – by Honduran security forces in September 1981.[4] He was never seen again. Manfredo was a graduate student and political activist opposed to the existing regime. *Amica* Velásquez sought justice from the Inter-American Commission on Human Rights. In a groundbreaking judgment, the Inter-American Court of Human Rights recognized forced disappearance as a grave human rights violation for which Honduras was liable, and ordered the state to compensate the family. *See* Velásquez Rodríguez Case, Inter-Am. Ct. H.R., OAS/Ser.L/V/III.21, doc. 14 (1989) at 123.

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[4] According to the Working Group on Enforced and Involuntary Disappearances (a U.N. mechanism created in 1980), forced disappearance consists of at least the following elements: "(a) Deprivation of liberty in whatever form; (b) Refusal to acknowledge the deprivation of liberty by the authorities; (c) Removal of the disappeared person from the protection of the law." Commission on Human Rights, *Inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, First Session, 6-17 January, 2003, Geneva, at http://www.unhchr.ch/huridocda/huridoca.nsf/0/04238ca85b0302b9c1256caf0055a5cf?Open Document.

Despite the legal importance of the case, the outcome fell far short of justice. "[T]he Government never admitted culpability, no one was ever punished, and the culture of impunity in Honduras was not changed," she noted. Zenaida Velásquez, Statement, *at* http://www.cja.org/forSurvivors/zenaida%20for%20survivors.shtml. Determined to pursue her claim, *amica* Velásquez, who had fled to the U.S. following threats to her own life, turned to the courts of her new home. On July 12, 2002 *amica* Velásquez, a U.S. citizen since 1997, and five other plaintiffs filed an ATCA claim against Juan López Grijalba, the former head of Honduran military intelligence for violations of international law, including torture, disappearances, and extrajudicial killings. Compl. ¶¶ 46-49, *Reyes v. Grijalba* (No. 02-22046). The complaint alleges that Colonel Grijalba is liable by virtue of command responsibility while in control of Battalion 3-16 and a secret death squad unit "operating in coordination with the Battalion or under its control" in the early 1980s. *Id.* ¶¶ 12, 88. Grijalba had been living in the United States since 1998, when he was granted Temporary Protected Status as a result of Hurricane Mitch. He was arrested by the immigration service in 2002, and witnesses and evidence discovered in the course of the ATCA lawsuit have proved instrumental in the deportation case.

Amica Velásquez observed:

> This case ... will enable us to hold a high-ranking official responsible and thereby begin to pierce the culture of impunity. ... If we win our case, and if López Grijalba is deported, that will have a tremendous impact in Honduras ... we can break the impunity that criminals like Colonel López Grijalba have enjoyed and realize the dream [of justice] shared by the families of the disappeared and tortured people everywhere.

Velásquez, Statement, *supra*.

C. Crimes Against Humanity: Zita Cabello-Barrueto.

Following the September 1973 coup in Chile, led by General Augusto Pinochet, military authorities arrested Winston Cabello, the brother of *amica* Zita Cabello-Barrueto. Winston Cabello worked as regional planning director for the Atacama-Coquimbo region in northern Chile under the government of President Salvador Allende. Winston Cabello was detained in a garrison in the northern town of Copiapó. Approximately one month after his arrest, Winston was killed by a secret military squad, which came to be known as "*La Caravana del Muerte*" or the "Caravan of Death," of which Fernández Larios was a member.[5] The Caravan of Death, a roving military death squad organized by Chilean dictator Augusto Pinochet, killed more than 70 civilians associated with the administration of the fallen Allende government. *See* Hugh O'Shaughnessy, *Pinochet: The Politics of Torture* 63 (2000).

In early 1974, *amica* Cabello-Barrueto and her husband were able to leave Chile and came to the United States where they obtained asylum and, eventually, U.S. citizenship. Ms. Cabello-Barrueto and her family yearned for justice for Winston's brutal murder, a quest they pursued for thirty years.

In 1998, *amica* Cabello-Barrueto discovered that Armando Fernández Larios was living in Florida. In 1999, the family filed an ATCA suit against Fernández Larios. *Estate of Cabello v. Fernández-Larios*, 205 F. Supp. 2d 1325, 1327-28 (S.D. Fla. 2002). Through the legal process

[5] Fernández-Larios was an officer-member of the Death Squad. Elizabeth Manning, *Humanity, Hope Amid Rights Statistics*, United Press Int'l, May 28, 2003. He later joined DINA ("*Direccion de Intelligencia Nacional*" or "Directorate of National Intelligence"), "Chile's feared secret police" as a major. David Adams, *27 Years Later, Chile's Caravan of Death Touches U.S.*, St. Petersburg Times, Mar. 13, 2000.

amica Cabello-Barrrueto overcame the sense of powerlessness and injustice she had felt:

> I want to honor the men and women who have had the moral courage to challenge the inevitability of injustice; to all of those who have come to the realization that peace based on accommodation rather than on accountability necessarily leads to the repetition of past tragedies; to those who have chosen to work in favor of human dignity, peace, solidarity and justice.

Zita Cabello-Barrueto, Statement, *at* http://www.cja.org/forSurvivors/ZitaforSurvivors.shtml.

On October 15, 2003, a federal jury found Fernández Larios liable for, *inter alia*, crimes against humanity for his role in Winston Cabello's murder. This was the first contested trial in the United States in which a jury awarded damages to a plaintiff for crimes against humanity.[6] Jason Dearen, *Woman's Painful Journey To Find Brother's Killer*, Oakland Tribune, Oct. 28, 2003.

D. Genocide: Alma Vilogorac.

Amica Alma Vilogorac (Jane Doe XI) is a Bosnian woman who resided in Sarajevo and its surrounding areas

[6] One modern definition of crimes against humanity may be found in the Statute of the International Criminal Tribunal for the Former Yugoslavia, article 5, which gives the tribunal jurisdiction over "the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts." Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

in Bosnia-Herzegovina during 1992-1993. Consolidated Compl. ¶ 15, *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994), *rev'd sub nom. Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (No. 93-878).

This was the period in which the city was besieged by Bosnian-Serb Forces. *Id.* The self-proclaimed leader of the Bosnian Serbs, Radovan Karadzic, declared that his goal was to destroy Sarajevo. John F. Burns, *Shelling By Serbs Pounds Sarajevo*, N.Y. Times, Aug. 1, 1992, at 1 (Karadzic announced that his goal was to "put the Muslims through the meat grinder" in Sarajevo.). *Amica* Vilogorac, along with her husband and infant son, suffered grenade attacks, sniper fire, and the deprivation of food and water. Consolidated Compl. ¶ 15, *supra*. "The level of bombing and terror and destruction was unimaginable." Aff. Jane Doe XI ¶ 9, *Karadzic*, 866 F. Supp. 734. "I witnessed the mass killings of people in bread and water lines. I stood on many of these lines, only to seconds later see arms, legs, flesh and blood flying all about. Neighbors, friends, acquaintances died from snipers, bombs, and burnings." *Id.* ¶ 12. Later, *amica* Vilogorac learned that her two brothers had "disappeared," and in November 1999, she was told that the bodies likely were buried in a mass grave. *Id.* ¶ 19.

In 1993, *amica* Vilogorac and twenty-one other plaintiffs filed an ATCA suit against Radovan Karadzic claiming, *inter alia*, that the defendant was liable for genocide against the Bosnian Muslim population. *Karadzic*, 866 F. Supp. at 736.[7] In 2000, a jury awarded the plaintiffs over $4.5 billion in damages. Pete Bowles & Patricia Hurtado,

[7] Plaintiffs alleged that "they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war." *Karadzic*, 70 F.3d at 236-37.

Karadzic Ordered To Pay $4.5 Billion, Newsday (Nassau Ed.), Sept. 26, 2000.

Amica Vilogorac remembers not only the gruesome facts of life during the war but also the sense of helplessness, the grotesque reality: "I lived there as if in a concentration camp; I could not leave and yet I could not stay. I stopped fearing death, surrounded as I was by death every single day. Indeed, I longed for death for what I experienced in Sarajevo cannot be described as life." Aff. Jane Doe XI ¶ 17, *supra*.

III. The ATCA Promotes Healing for Individuals and Their Communities, as Well as Justice.

Through the ATCA, U.S. federal courts promote justice for survivors of the most serious violations of treaty and customary international law. *Amici curiae* seek to underscore the effects of the pursuit of justice through the ATCA on survivors of atrocities and their communities.

A. ATCA Trials Help to Break the Silence for Individual Plaintiffs.

Perpetrators of genocide, crimes against humanity, disappearances, and other atrocious violations of international human rights and humanitarian law frequently deny the fact of or their complicity in the horrors. In the face of official accounts that flatly contradict the truth and falsely portray victims as wrongdoers, survivors bury their loss in silence. For example, officials disseminated a false story that Winston Cabello was one of thirteen political prisoners killed while trying to escape. *Fernández Larios*, 205 F. Supp. 2d at 1327. Enormously disturbed by the unacknowledged truth of her brother's killing, *amica* Cabello-Barrueto never shared it with her family. Zita Cabello-Barrueto, *Fighting Impunity in Chile: A Bay Area Family's Legal Victory*, World Affairs Council of Northern California (Feb. 5, 2004), *at* http:// wacsf.vportal.net (audio archive, at 13:34) [hereinafter *Fighting Impunity*]. The

ATCA provides a mechanism for survivors to break the silence surrounding the abuses they or their family members have experienced, by testifying in a judicial forum.

Psychologists have documented the effects of trauma on survivors of gross human rights violations. D. Silove et al., *The Psychological Effects of Torture, Mass Human Rights Violations, and Refugee Trauma: Toward an Integrated Conceptual Framework*, 187 J. of Nervous and Mental Disease 200 (1999); Guus Van Der Veer, *Psychotherapeutic Work with Refugees, in Beyond Trauma: Cultural and Societal Dynamics* 151 (Rolf J. Kleber et al., eds., 1995). The violent nature of the abuses disrupts survivors' relationships to the world by stripping them of their autonomy and sense of control. Elizabeth Lira Kornfeld, *The Development of Treatment Approaches for Victims of Human Rights Violations in Chile, in Beyond Trauma, supra*, 116-17. Research indicates that disclosure and establishment of the truth behind the occurrence of grave human rights violations are important features of survivors' recovery. Mental health professionals avow that the "conspiracy of silence" – the absence of public discussion about abuses – which frequently surrounds gross human rights violations is detrimental to the recovery of survivors by intensifying their already profound sense of isolation and mistrust of society. Judith Herman, *Trauma and Recovery: The Aftermath of Violence From Domestic Abuse to Political Terror* 9, 93 (1997); *see, e.g.*, Yael Danieli, *Preliminary Reflections from a Psychological Perspective, in Transitional Justice: How Emerging Democracies Reckon with Former Regimes* 572 (Neil J. Kritz ed., 1995).

Truth, as a premise of redress for survivors, should be understood to entail not only knowledge, but also acknowledgment; that is, "the determination of facts about the past, and a full, public, and official acknowledgement thereof." Michelle Parlevliet, *Considering Truth: Dealing with a Legacy of Gross Human Rights Violations*, 16 Netherlands Quarterly of Human Rights 143, 145 (1998).

Amicus Juan Romagoza, characterized his experience of breaking the silence at trial as a vehicle for healing and justice:

> The most important thing is to speak out and not let yourself be dominated by silence. But it's not just speaking and opening wounds. . . . We need to find spaces that can generate mechanisms or channels for justice, and not just put these people in jail but prevent this kind of activity from happening again, and isolate torturers who come to the United States in search of a paradise.

Juan Romagoza, Statement, *at* http://www.cja.org/forSurvivors/JuanforSurvivors.shtml.

B. ATCA Trials Enable Survivors to Seek Dignity and Justice on behalf of their Loved Ones and their Broader Communities.

ATCA plaintiff *amici curiae* understand their role as seeking justice not simply in their individual capacity, but also as acting on behalf of loved ones and all those who were killed or otherwise brutalized and who have been unable to find their day in court.

Clinicians have noted that survivors pursuing legal action against their perpetrators may find meaning in their experience, a response Professor of Psychiatry Judith Herman has labeled a "survivor mission." Herman, *supra* at 207-11. Similarly, one study of war crimes survivors who appeared before the International Criminal Tribunal for the Former Yugoslavia found that testifying about the events enabled them to discharge the "moral debt" they felt to those who had been killed to tell the story of how they perished. Eric Stover, Human Rights Center, University of California, Berkeley, *The Witnesses: War Crimes and the Promise of Justice in the Hague* 65, 127 (2003).

Amicus Carlos Mauricio felt he testified both for himself and also for those who could not:

> To close the seal of my healing, I needed to talk in front of a jury and tell them my story. . . . How many were able to confront the generals? Very few. They couldn't because they were killed under torture, or they didn't want to. . . . [I]n a way, I was the spokesperson for those who for whatever reason, couldn't come.

Rona Marech, *A Survivor's Victory Salvadoran Torturers Are Found Guilty,* S. F. Chron., Aug. 19, 2002, at B1.

Thus the ATCA enables survivors to pursue justice and find a moral purpose in so doing. The legal process transforms individual loss into social capital. As captured by *amica* Cabello-Barrueto: "[Winston Cabello's] senseless death can only have meaning if those who survived learn how to prevent these atrocities from happening all over again." Cabello-Barrueto, Statement, *supra*.

A victory for a single ATCA plaintiff can lead to a sense of victory for his or her community. *Amica* Cabello-Barrueto returned to Chile after the trial where she discovered: "the feeling . . . of everyone who lived in Chile [that] no member of the Caravan of Death would ever be prosecuted in Chile. So people approached me and said Winston spoke for everybody, for all those who could no longer speak." *Fighting Impunity*, *supra*, at 32:50.[8] The ATCA victory of *amici* Mauricio, Romagoza and Gonzalez against two former Salvadoran generals similarly reverberated in the survivors' home country. Maria Julia Hernandez, director of the Human Rights Office of the Archdiocese of El Salvador stated:

[8] Reacting to the verdict against Fernández Larios, the widow of Winston Cabello commented: "Dignity has been recovered. We share this with all of the family members, all of the families of victims that are in Chile." *Jury Order Ex-Officer to Pay Restitution*, S. F. Chron., Oct. 15, 2003.

> The process and the verdict in this case are accomplishments in a long and most difficult fight against impunity. It is a case in which all the victims of El Salvador . . . emerged and were represented by these brothers and this sister. Such administration of justice is what we have always hoped to realize. Now each of us has been touched in a way that inspires us to continue on this road.

Sandra Coliver, *Human Rights Accountability: Impact of Tort Cases Against Individual Perpetrators, at* http://www.alternet.org/story.html?StoryID=17151 (quoting Maria Hernandez).

C. The ATCA Provides Judicial Acknowledgement of and Accountability for the Harm Suffered by Survivors.

The authoritative record of events created during an ATCA trial serves as a public acknowledgment of harms endured by survivors. This affords survivors a measure of what legal scholar Martha Minow has called "the key of formal justice." Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* 26 (1998). Mental health professionals have noted positive aspects to formal justice. Psychologists have found that official acknowledgment of the truth of the survivors' stories counters the past denials or distorted versions of events and helps to end the "political violence" inflicted on them. *See* Nora Sveaass & Nils Johan Lavik, *Psychological Aspects of Human Rights Violations: The Importance of Justice & Reconciliation*, 69 Nordic J. of Int'l L. 35, 49 (2000); *see also*, Danieli, *supra,* at 572. A court judgment that the survivor's suffering merits reparation "is also a definition of the survivor as a worthy or deserving victim." Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches, in Impunity and Human Rights in International Law and Practice* 19 (Naomi Roht-Arriaza ed., 1995).

Trial judgments provide a "direct, moral, and ethical response to victims on behalf of society that demonstrates the state is validating their innocence and their lack of culpability in the deeds." Laurel E. Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 Human Rights Quarterly 573, 590 (2002). *Amica* Demissie's ATCA case against Ethiopian "Red Terror" torturer Kelbessa Negewo fostered community acknowledgment of his heinous acts. Woubishet Tedla, of the Ethiopian Community Association in Atlanta commented on the impact of *amica* Demissie's suit: "[I]t is pretty much accepted that this man did the things these women say he did, and most in the community pretty much avoid him. Many people praise these women for going out of their way and making the sacrifices they did to bring this suit." Ronald Smothers, *Nightmare of Torture in Ethiopia Is Relived in an Atlanta Court*, N.Y. Times, May 22, 1993, at 6.

The impartiality, solemnity, and formal procedures of U.S. courts provide ATCA plaintiffs a respectful forum to adjudicate their allegations. American judicial procedures respond to the need of many survivors for a considered decision regarding their substantive claims. One study concluded that individuals are sensitive to the process and procedures they experience as litigants. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 Law & Soc'y Rev. 957-58 (1990). More important than the outcome of the case, the perceptions of litigants about the judicial process predominantly are determined by the respect and dignified treatment they are accorded, the perceived control over the case outcome and the litigation process, and the symbolic features of the procedures. *Id.* *Amicus* Romagoza observed that the lawsuit "first gave me the hope I needed in order to believe in justice, to believe that justice can come, particularly in this country, my new country, the USA." Romagoza, Statement, *supra*.

ATCA plaintiffs and those who work closely with them substantiate these findings. As noted above, most plaintiffs are motivated by the opportunity to confront their persecutors in court, to expose their crimes, and to divest them of their undeserved dignity. Beth Stephens & Michael Ratner, *International Human Rights Litigation in U.S. Courts* 234 (1996). One co-plaintiff of *amica* Demissie described confronting her abuser in court as follows: "It felt good. . . . Before I was tied up and hanging upside down. But this time I am standing up and facing him. I don't have to be afraid of him. . . . Maybe finally he will have to pay for making so many lives miserable." Smothers, *supra*.

In addition to public acknowledgment, the award of damages constitutes judicial recognition of the pain and suffering of survivors and the responsibility of defendants for causing the injuries.[9] A central purpose of punitive damages in U.S. civil litigation is to punish the wrongdoer for "outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts §908 (2003).[10] Given the

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[9] "[T]he plaintiffs in [ATCA] cases . . . take tremendous satisfaction from filing a lawsuit, forcing the defendant to answer in court or to abandon the United States, and creating an official record of the human rights abuses inflicted on them or their families." Beth Stephens & Michael Ratner, *International Human Rights Litigation in U.S. Courts* 234 (1996). One legal scholar has described accountability in ATCA litigation as consisting of multiple components: (1) compensation; (2) denial of a safe haven to the defendant; (3) deterrence of similar conduct; and (4) "the enunciation of legal norms opposing the conduct for which the defendant has been found liable." Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 n.11 (1991).

[10] As the court in an ATCA case against a Rwandan perpetrator noted: "One can not place a dollar value on the lives lost as the result of the defendant's actions and the suffering inflicted on the innocent victims of his cruel campaign. Unfortunately, however, a monetary judgment is all the Court can award these plaintiffs." *Mushikiwabo v. Barayagwiza*, 1996 U.S. Dist. LEXIS 4409, at *6 (S.D.N.Y. Apr. 9, 1996).

serious violations adjudicated under the ATCA, judges and juries have awarded punitive damages in all successful judgments under the statute. *Abebe-Jira v. Negewo*, 72 F.3d 844, 846 (11th Cir. 1996); *Karadzic*, 70 F.3d 232; *Estate of Cabello v. Fernández-Larios*, No. 99 Civ. 0528 (S.D. Fla. Oct. 31, 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1360 (N.D. Ga. 2002); *Romagoza, Gonzalez & Mauricio v. Garcia*, No. 99-8364 (S.D. Fla. Jul. 31, 2002); *Mushikiwabo v. Barayagwiza*, 1996 U.S. Dist. LEXIS 4409, at *6 (S.D.N.Y. Apr. 9, 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass 1995); *In re Estate of Marcos Litigation*, D.C. No. MDL 840 (D. Haw. Feb. 3, 1995); *Paul v. Avril*, 901 F. Supp. 330, 336 (S.D. Fla. 1994); *Todd v. Panjaitan*, 1994 WL 827111 (D. Mass. 1994); *Forti v. Suarez-Mason*, No. C-87-2058-DLJ (N.D. Cal. Apr. 25, 1990); *Martinez-Baca v. Suarez-Mason*, No. C-87-2057 SC (N.D. Cal. Apr. 22, 1988); *Filártiga*, 577 F. Supp. 869.

IV. The ATCA Should Be Preserved Because It Provides a Remedy for Mass Atrocities, War Crimes, Slavery, and Other Human Rights Violations Not Covered by the TVPA.

As noted previously, Congress clearly intended the ATCA to augment the remedies created by the TVPA. *Supra*, Section I. In particular, the ATCA is critical to survivors of widespread, mass, and systematic abuses, because it allows adjudication of claims such as crimes against humanity, war crimes, and genocide. Restatement of Foreign Relations, *supra*, § 702; *see also Fernández Larios*, 205 F. Supp. 2d at 1331; *Kadic v. Karadzic*, 70 F.3d at 242. Similarly the ATCA provides a remedy for serious violations of individual human rights that are excluded from current interpretation of the TVPA. *Supra*, Section II.

A. Mass Violations Are Not Covered by the TVPA.

It is especially important for survivors of situations in which thousands of people were affected to achieve recognition of these collective crimes in their trials in order to promote social reintegration. *See, e.g.*, Diana Kordon et al., *Argentina: Psychosocial and Clinical Consequences of Political Repression and Impunity*, 8 Quarterly J. on Rehabilitation of Torture Victims & Prevention of Torture, 43, 44 (1998). While claims under the TVPA recognize individual acts of torture and extrajudicial killing, where these violations occur as part of a campaign or policy, survivors are unable to obtain legal acknowledgment of the collective dimension of their suffering.

B. Important Individual Violations Are Not Covered by the TVPA.

The jurisdictional limitation of the TVPA is a concern not only for mass acts like genocide and crimes against humanity, but also for grave individual violations such as arbitrary detention and slavery (suffered by *amici* John Roe VIII, John Doe V and John Doe XI). Egregious human rights abuses frequently occur in conjunction with each other – *amica* Velásquez' brother, Manfredo, was arbitrarily detained, disappeared, and executed. *Reyes* Compl. ¶¶ 87-88, *supra*. To provide a cause of action for merely one act in a course of conduct by the perpetrators fails to allow the survivors to confront the entirety of their experience in trial, and furthermore fails to adjudicate the entirety of their claims. As Professor Minow points out, the process of remembering and acknowledging these atrocities requires assembling all of the distinct aspects of the abuse. Minow, *supra*, at 120.

For example, some *amici curiae* survivors were tortured during the course of their arbitrary detention; however, only the torture violation is currently recognized under the TVPA. *Amicus* Mauricio was arbitrarily

detained by authorities. Second Am. Compl. ¶ 38, *Romagoza, Gonzalez & Mauricio v. Garcia*, No. 99-8364 (S.D. Fla. July 31, 2002). He was held at a "clandestine torture center at the National Police headquarters as a suspected Farabundo Marti National Liberation Front (FMLN) '*comandante*' (commander)." *Id.* ¶ 38. Initially, he was given no food or drink. *Id.* ¶ 39. Later, *amicus* Mauricio was forced to stand for hours while in detention. *Id.* Failure at this exercise resulted in additional torture. *Id.*

Amicus Romagoza also was held in arbitrary detention. *Romagoza* Compl. ¶ 18, *supra*. He "was blindfolded and taken by helicopter to a local army garrison." *Id.* ¶ 15. "During the flight, soldiers pushed [Romagoza] to the edge of the open door of the helicopter and threatened to throw him out. Upon his arrival at the garrison, [Romagoza] was stripped of his clothes, bound spread eagle to a table, interrogated and beaten." *Id.* The TVPA allows the adjudication solely of survivors' claims of torture and fails to provide an acknowledgement or a remedy for their arbitrary detention which clearly forms an integral component of the violations for which they seek justice.

Claims adjudicated solely under the TVPA risk exclusion of important abuses which form part of more widespread, systematic human rights abuses as well as those which are serious violations of customary international law – slavery, arbitrary detention, disappearances – yet not enumerated in the TVPA. Congress clearly found it unnecessary to include these violations in the TVPA given that the ATCA already covered these abuses. Consistent with Congressional intent, the ATCA enables civil prosecution of survivors' claims that permits broad legal acknowledgement of their victimization.

V. Severely Narrowing the Judicial Interpretation of the ATCA Would Limit the Ability of U.S. Courts to Contribute to the International Effort to Promote Accountability for Grave Violations of Customary International Law.

A. ATCA Litigation Helps Rid the U.S. of Human Rights Violators.

"In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest." *Filártiga*, 577 F. Supp. at 890. The ATCA has been an important asset for the U.S. government to locate and identify known violators of human rights. Currently, U.S. immigration laws have the unintended effect of allowing war criminals and human rights abusers to enter and remain in the United States. Senate Report on the Anti-Atrocity Alien Deportation Act (107 Cong., 2d Sess. April 25, 2002), SR 107-155, to accompany S.864, Section IV.[11]

The U.S. Bureau of Immigration and Customs Enforcement ("ICE") is taking steps to track down these perpetrators. ICE reported that, as of January 2004, it had opened files on more than 200 suspected human rights abusers. Press Release, ICE, ICE Arrests Ghanaian Human Rights Violator (Jan. 28, 2004).[12] ICE officials recognize that many of these abusers pose a national

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[11] As stated by the Senate Report in support of legislation to close several legal loopholes: "Through these legal loopholes, the United States has become a safe haven for those who exercised power in foreign countries to terrorize, rape, murder and torture innocent civilians. The problem is more than a set of isolated incidents." Senate Report on the Anti-Atrocity Alien Deportation Act (107 Cong., 2d Sess. April 25, 2002), SR 107-155, to accompany S.864, Section IV.

[12] *See also* A. Chardy, *Two Haitian Torture Suspects Held in S. Florida Pending Deportation*, Miami Herald, Dec. 20, 2003.

security threat. Michael T. Dougherty, ICE Operations Director, stated that the September 11, 2001 attacks prompted a close look at the issue of human rights abusers because there is "a nexus, in some cases, between the persecutors and ongoing risks to national security." M. Valbrun, *U.S. to Pursue Torturers Who Flee Here*, Wall St. Journal, May 8, 2003, at A4.

ATCA cases have provided a great boost to immigration service efforts in identifying high level and serious human rights abusers. ATCA cases that have brought crucial new evidence of abusers to the immigration service's attention include the following:

- Kelbessa Negewo was a former senior government official in the Ethiopian military dictatorship that, in the 1970s, launched what came to be known as the Red Terror. He later came to the U.S. and eventually got a job at the same hotel in Atlanta where one of his torture victims also worked. She, together with *amica* Demissie and another survivor, brought an ATCA case against him. A U.S. court determined that Negewo had indeed engaged in numerous acts of torture and other human rights abuses against them. The court's award of compensatory and punitive damages in the amount of $1.5 million to the plaintiffs was subsequently affirmed by an appellate court. *See Negewo*, 72 F.3d 844. The victims' lawyers submitted the trial record to the immigration service and urged that Negewo be deported. Because of the lawyers' protests, Negewo is now facing a denaturalization proceeding.
- Alvaro Rafael Saravia, a captain in the Salvadoran military, was named in numerous credible reports – including the U.N. Truth Commission Report – as having been actively involved in planning and carrying out the 1980 assassination of revered Archbishop Oscar Romero. Indeed, he was detained in a U.S. prison for fourteen months based on a warrant for his extradition from a lower court in El Salvador. When El Salvador's then highly politicized Supreme Court quashed the warrant in 1987, Saravia was released

from prison and has remained in the U.S. As a result of an ATCA case brought against him with the assistance of *amicus* Center for Justice and Accountability ("CJA"), the immigration service once again is investigating him.

- Nikola Vuckovic, a Bosnian Serb, entered the United States as a refugee in 1996. *Amicus* Kemal Mehinovic, assisted by *amicus* CJA, filed an ATCA case against him in 1998, and urged the immigration service to deport him. The service, however, was unable to obtain sufficient evidence to commence deportation proceedings. In 2002, a federal judge found Vuckovic liable for crimes against humanity, including the torture of four Bosnian Muslim plaintiffs. As a result of the lawsuit, Vuckovic fled the country. Bill Rankin, *U.S. Judge in Atlanta Awards $140 Million to Men Who Claimed Torture in Bosnia*, Atlanta Journal-Constitution, Apr. 30, 2002, *at* http://www.cja.org/cases/Mehinovic_News/Atlanta%20Journal%204%2030%2002.htm.
- Col. Carl Dorelien, a member of Haiti's High Command, was arrested by the immigration service and, in January 2001, deported back to Haiti for his command responsibility for a massacre of more than 100 civilians committed in April 1994. However, in 1997, Dorelien had won $3.2 million in the Florida State Lottery. The immigration service could do nothing to block his access to those assets. It is only because of an ATCA suit, filed with the assistance of *amicus* CJA that his victims are able to prevent him from keeping that money. A. Chardy, *Ex-Haitian Colonel Sued to Pay Massacre Victim's Family*, Miami Herald, Jan. 26, 2003.

These cases are by no means exceptional.

ATCA lawsuits provide a valuable complement to the government's efforts. Of the eighteen defendants successfully sued under the ATCA, ten left the country and one

was deported, all seemingly in response to the lawsuits. Coliver, *supra*.[13] Moreover, there is anecdotal evidence that the lawsuits are deterring violators from coming to the United States who might otherwise do so.[14] The lawsuits

[13] Following are the names of individual defendants who have been found liable under the ATCA, their nationality, and whether and under what circumstances they left the United States after the trial: Peña-Irala, *Filártiga*, 630 F.2d 876 (Paraguayan, deported); Suarez-Mason, *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (Argentinean, extradited); ex-President Marcos, *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986) (Filipino, died); Imee Marcos-Manotoc, *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (Filipina, voluntarily departed); Barayagwiza, *Barayagwiza*, U.S. Dist. LEXIS 4409 (Rwandan, voluntarily departed); Panjaitan, *Todd v. Panjaitan*, 1994 WL 827111 (D. Mass. 1994) (Indonesian, voluntarily departed); Negewo, *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (Ethiopian, remained); Avril, *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (Haitian, voluntarily departed); Vukovic, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (Bosnian Serb, no longer living openly in United States, presumed to have departed or living underground); Garcia, *Estate of Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) (Salvadoran, remains); Casanova, *Romagoza, Gonzalez & Mauricio v. Garcia*, No. 99-8364 (S.D. Fla. July 31, 2002) (Salvadoran, remains); Fernández Larios, *Cabello Barrueto v. Fernández Larios*, 291 F. Supp. 2d 1360 (S.D. Fla. 2003) (Chilean, remains); Sosa, *Alvarez-Machain v. U.S.*, 331 F.3d 604 (9th Cir. 2003) (Mexican, remains in the witness protection program). Five defendants were successfully sued who were on visits to the U.S., all of whom left shortly after the lawsuit was filed: Karadzic, *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) (Bosnian Serb); Lumintang, *Doe v. Lumintang*, Civ. No. 00-674 (D.D.C. Sept. 10, 2001) (Indonesian); Gramajo, *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (Guatemalan), Kavlin, *Kodak v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997) (Bolivian); Assasie-Gyimah, *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996) (Ghanaian).

[14] General Emilio Ponce, Salvadoran former Minister of Defense (1990-93) and the President of a newly formed Association of Veterans of El Salvador which supports the right-wing ARENA party, complained that "he and his partners are suffering persecution for the work they did." He criticized the recent lawsuits in the United States against former ministers Guillermo Garcia and Eugenio Vides Casanova for human rights violations and said that these cases make it harder for

(Continued on following page)

are likely to have more of a deterrent impact than the deportations given that the lawsuits receive more publicity in the defendants' home countries, in part because the defendants in the civil suits tend to be high level offenders and because the civil trials are open to the public whereas the deportation proceedings are generally closed. "We have sent a loud message," said *amicus* Mauricio, "torture is not permitted and there's no impunity anymore ... [the perpetrators] will always have to be wary that someone may recognize them and bring them to justice." Robert Collier, *Florida Jury Convicts Two Salvadoran Generals of Atrocities: $54.6 Million Awarded to Three Torture Victims*, S.F. Chron., July 24, 2002, at A12.

B. ATCA Cases Strengthen the Rule of Law in the Countries from Which the Defendants Came.

Most ATCA plaintiffs are unable to pursue justice in their home countries for a variety of reasons. Amnesty laws may preclude prosecution; lawyers and plaintiffs, and even judges and prosecutors, may be subject to intimidation; and/or the justice system simply may not have the resources or political will to prosecute the cases. *See* Amnesty International, *Torture Worldwide: An Affront to Human Dignity*, 107 (2000) (noting various countries in which evidence is covered up, investigations are ineffective, officers are complicit, and even the definition of international crimes is not in line with international human rights law).

them to visit the United States. *Military Requests to Preserve Amnesty*, La Prensa Grafica (one of El Salvador's leading papers), Feb. 14, 2004, at. 2 (translation by Almudena Bernabeu).

ATCA cases can play a powerful role in mobilizing the necessary political will. The successful ATCA case of *amici curiae* Romagoza, Mauricio, and Gonzalez triggered discussions in El Salvador about the need to hold perpetrators of past crimes accountable. In fact, one member of the Salvadoran Congress has called for the repeal of the 1993 Amnesty law. Coliver, *supra*. The ATCA trial of Fernández Larios received extensive coverage by the Chilean and Argentine press. *See, e.g., Civil Action Brought by Executed Man's Family*, The Santiago Times, Sept. 24, 2003; *El Martes Comienza en Miami el Juicio Contra el Ex Capitan de Ejercito Armando Fernández Larios (On Tuesday the Trial Against the Former Army Captain Fernández Larios Begins in Miami)*, ArgenPress, Sept. 20, 2003.

Legal scholar Elliot Schrage suggests that the existence of the ATCA may be a useful incentive to corporations to support the strengthening of judicial systems in the countries where they operate. He supports a strategy that would "harness the power of private litigation in U.S. courts . . . [to be] a vehicle for encouraging other countries and the corporations that operate in them to promote respect for the rule of law and improve the administration of justice." Elliot Schrage, *Judging Corporate Accountability in the Global Economy*, 42 Columbia J. Transnat'l L. 53, 57 (2003).

VI. The ATCA Is Unlikely to Create a Flood of Litigation.

While the impact of cases on particular survivors and their communities has been immeasurable, the number of cases likely to be filed is very modest. To date, the federal courts have been fully capable of dismissing lawsuits that do not meet the rigorous jurisdictional thresholds of ATCA jurisprudence. As a result, only a few ATCA lawsuits have

been allowed to proceed by the courts; since 1980, judgments have been rendered against only eighteen defendants, including Sosa.[15] Courts have begun to dismiss cases on *forum non conveniens* as well as other grounds. *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

Even for those individuals who satisfy the procedural requirements, the decision to pursue a civil remedy is a difficult one, and not all victims demand their day in court.[16] "Not many people can go through this sort of thing, to allow yourself to go through just as much pain as when you were tortured. [*Amicus* Romagoza] is the bravest man I know," remarked Dr. Karen Hanscom, a psychologist who attended the Romagoza trial. Joshua Phillips, *The Case Against the Generals*, The Wash. Post Mag., Aug. 17, 2003, at W06.

The modest numbers of successful ATCA cases, however, continue to have an enormous impact on the lives of the litigants, their families, and their home communities. These survivors have been devastated by horrible abuses for which there will never be adequate compensation. The ATCA, however, represents a small seed of justice that has already been planted in their lives and communities. *Amica* Cabello-Barrueto recalls her brother telling her, the last time she saw him alive, in prison: "[The Pinochet

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[15] *See supra*, note 13.

[16] Not only does a trial mean recalling terrible physical and psychological traumas from the past, but many victims do not take actions to formally establish the truth out of a fear of negative consequences to themselves and their families in the home country. *See* Priscilla Haynar, *Unspeakable Truths: Confronting State Terror and Atrocity* 185 (2001); *see also* Richard Knudten et al., *The Victim in the Administration of Criminal Justice: Problems and Perceptions, Criminal Justice and the Victim* 115-146 (William F. McDonald ed., 1976) (discussing the various psychological obstacles to victims confronting a trial).

forces] can cut all the flowers, but they can never prevent the spring from coming back." In reflecting on the meaning of her suit, she commented: "We have the spring back now." *Fighting Impunity*, *supra*, at 52:53.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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February 27, 2004

APPENDIX A

Amici Curiae

For ease of identification, *amici curiae* individual ATCA plaintiffs are listed per the ATCA case each filed.

Abebe-Jira v. Negewo

Elizabeth Demissie was the daughter of a prominent Ethiopian judge. In 1977, Kelbessa Negewo, an official in the military government, began targeting her and her family. Negewo had Elizabeth detained several times. During her last imprisonment she was brutally tortured. Her sister, with whom Elizabeth was arrested, was taken from their cell the same night and never heard from or seen again. In 1981, Elizabeth came to the United States. In 1990, Elizabeth and two other women brought an ATCA suit against Negewo in Atlanta, Georgia, where he was living and working, for torture and were awarded $1.5 million in damages.

Romagoza, Gonzalez and Mauricio v. Garcia and Vides Casanova

Juan Romagoza Arce, M.D. worked as a physician and surgeon in El Salvador until 1980, when he was detained and tortured at the National Guard Headquarters. After his release, Dr. Romagoza fled El Salvador. He arrived in the United States in April of 1983 and subsequently was granted political asylum. Because of torture to his arm and hands he has been unable to perform surgery. He now directs a major public health clinic in Washington D.C.

Neris Gonzalez was a catechist in El Salvador in 1979 when she was detained and tortured in a National Guard

Post while being eight months pregnant. Her infant son was born with multiple injuries, broken bones and indentations on his face. He died two months after his birth. Gonzalez fled El Salvador for the United States and was eventually granted political asylum.

Carlos Mauricio was a professor at the University of El Salvador when he was detained in June 1983 and tortured at the National Police Headquarters. Upon being released, Mauricio fled to the United States, where he is now a legal permanent resident. In 1999, he and *amici* Dr. Romagoza and Neris Gonzalez filed an ATCA lawsuit against Generals Garcia and Vides Casanova. In July 2002, a Florida jury found the generals responsible under the doctrine of "command responsibility" for horrific acts of torture perpetrated against the plaintiffs and were ordered to pay $54.6 million to the plaintiffs.

Cabello-Barrueto, et al. v. Fernández Larios

Zita Cabello-Barrueto, Ph.D., was 27 years old when on October 17, 1973, a Chilean military death squad that came to be known as "the Caravan of Death" murdered her brother, Winston Cabello, and twelve other prisoners who had been incarcerated by the Chilean Army. Ms. Cabello-Barrueto and her husband, who also had been a political prisoner, fled to the United States, where they received political asylum. She earned a Ph.D. in Economics at the University of California in Berkeley and became a college professor. In February 1999, Dr. Cabello-Barrueto and three family members filed a complaint in U.S. District Court in Miami against Armando Fernández Larios, a member of the Caravan, alleging that he directly carried out, or participated in bringing about, Winston's murder.

On October 15, 2003, a jury found Fernández Larios liable for numerous violations including crimes against humanity and awarded her family $ 4 million in damages. This was the first crimes against humanity judgment in a contested case before a U.S. court.

Doe v. Karadzic

Alma Vilogorac (Jane Doe XI) is a Bosniak (Bosnian Muslim) who resided in Sarajevo and its surrounding areas in Bosnia-Herzegovina during the conflict in 1992-1993. During this time the city was besieged by Bosnian-Serb Forces. Alma Vilogorac, along with her husband and infant son, experienced grenade attacks, sniper fire, and the deprivation of food and water. Her brothers were disappeared. In 1993, Alma Vilogorac and twenty-one other plaintiffs filed an ATCA suit against Radovan Karadzic, political leader of the Bosnian Serb forces, for his responsibility for numerous grave violations including genocide. In 2000, a jury awarded the plaintiffs over $4.5 billion in damages.

Filártiga v. Peña-Irala

Dolly Filártiga and her younger brother Joelito lived in Asuncion, Paraguay, in 1976, with her mother and father, a long-time opponent of Paraguay's dictator, General Alfredo Stroessner. That year, her brother was abducted and later tortured to death by Americo Norberto Peña-Irala, the Inspector of Police of Asuncion. Dolly Filártiga was forced out of her house in the middle of the night to view her brother's mutilated body. After her arrival in the United States, she sued Peña under the ATCA in New York, becoming the first plaintiff to successfully use this

two-centuries-old statute to seek justice for human rights violations. In 1984, she and her father were awarded over $10 million in damages.

Mehinovic v. Vuckovic

Kemal Mehinovic is a Bosniak (Bosnian Muslim). In 1992, he was arrested by Serb police in his home and beaten in front of his wife and children. He was taken to a prison where he was brutally tortured and later sent to concentration camps. He was later released and admitted to the United States with his family as refugees in 1995. In 1998 Mr. Mehinovic and three other Bosniaks filed suit under the ATCA against Nikola Vuckovic, one of his torturers. In April 2002, a trial judge found Vuckovic liable for severe acts of physical and mental abuse amounting to crimes against humanity and awarded $35 million to each of the plaintiffs.

Reyes, et al. v. Grijalba

Oscar Reyes is a native of Honduras, and a journalist and communications professional. He holds a master's degree in mass communications from the University of Minnesota. He was the founder and director of the School of Journalism at the National University of Honduras, and served as a communications advisor to the Honduran Minister of Culture, Tourism, and Information.

Gloria Reyes, a native of Nicaragua, moved to Honduras with her husband, *amicus* Oscar Reyes, in 1970 and became a Honduran citizen. In July 1982, the Reyeses were abducted by Honduran Security forces and subjected to electric shock and beatings in a clandestine torture facility. They were released from detention, thereafter

fleeing to the United States and eventually becoming U.S. citizens.

Zenaida Velásquez is the sister of Manfredo Velásquez Rodriguez, who was abducted and disappeared by Honduran security forces on September 12, 1981. In 1988, Ms. Velásquez left Honduras for the U.S., receiving asylum in 1994, and becoming a U.S. citizen in 1997. She filed a case with the Inter-American Commission of Human Rights, which led to the ground breaking decision of the Inter-American Court holding the Government of Honduras liable for the disappearance and death of her brother. As no individual was ever held liable by the Inter-American Court, Ms. Velásquez filed an ATCA claim on July 15, 2002 against Juan López Grijalba, the alleged commander of the death squad that disappeared her brother. *Amici* Oscar and Gloria Reyes are also plaintiffs in the suit, alleging that Grijalba had command responsibility for their torture. Their case is scheduled to go to trial before a jury in Miami in July 2004.

Roe v. Unocal Corporation, Doe v. Unocal Corporation

John Roe VIII was a farmer in Kaleinaung, Burma where security forces for the oil company, Unocal, regularly rounded up John Roe VIII and most of his adult male family members, forcing them to construct an oil pipeline. He was tied up at night to prevent escape and on several occasions severely beaten. In 1996, he fled to Thailand to escape forced labor, where he lives in hiding as an undocumented alien.

John Doe V and **John Doe XI** also are survivors of forced labor performed on the Unocal pipeline project in Burma. John Roe VIII, John Doe V and John Doe XI are

plaintiffs in two related ATCA suits against Unocal Corporation filed in 1996 in U.S. district court in California seeking damages for forced labor and other violations of customary international law. The suits remain pending.

SINALTRAINAL v. Coca-Cola Co.

Jose Domingo Flores is a member of the executive board of a trade union representing employees at Coca Cola's subsidiary bottling plants in Colombia. In 1996, the Chief of Security at one of the plants falsely accused Mr. Flores and two other union leaders of planting a bomb at the site following a five-day strike led by Mr. Flores. The accused were arrested and held in a prison controlled by the paramilitaries and subjected to abuse. Released after the prosecutor dismissed the charges as false, Mr. Flores and his family were economically devastated and traumatized as a result of his months in prison. After exhausting all available options in Colombia, Mr. Flores filed an ATCA complaint against Coca Cola for, *inter alia*, unlawful detention and torture, in the Federal District Court for the Southern District of Florida on July 21, 2001. This case is pending.

The National Consortium of Torture Treatment Programs is comprised of 27 member torture treatment programs throughout the country which share knowledge and expertise in order to foster the development, in quality as well as quantity, of specialized programs devoted to caring for survivors of torture. Together, they provide services to more than 2,500 torture survivors annually.

The Center for Justice and Accountability (CJA) is a non-governmental organization based in San Francisco that, among other activities, represents survivors of severe

human rights atrocities in civil suits against their persecutors who live in or visit the United States. CJA has pioneered an integrated approach to the quest for justice that combines legal representation with referrals for needed medical and psychosocial services, and outreach to schools, community organizations and the general public.

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JOSÉ FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE WORLD JEWISH CONGRESS AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The World Jewish Congress (WJC) is an international federation of Jewish communities and organizations. WJC represents Jews from the entire political spectrum and from all Jewish religious denominations, and serves as a diplomatic arm of the Jewish people to world governments and international organizations. WJC's membership includes more than 100 communities organized in regional frameworks: North America, Latin America, Europe, Euro-Asia, Israel and the Asia-Pacific. The WJC appears in this brief since it played a leading role in the Holocaust restitution movement, which included litigation using the Alien Tort Claims Act ("ATCA"), the very same law being considered in this appeal.[2]

The American Jewish Committee ("AJC"), a national human relations organization with over 125,000 members and supporters and 33 regional chapters, was founded in 1906 to protect the civil rights and religious liberty of Jews. It is the conviction of AJC that those rights will be secure only when the rights of all persons are equally secure. AJC believes that the Alien Tort Claims Act provides a vitally important means of redress for non-citizen victims of

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[1] This brief is filed with the written consent of the parties. Their blanket consents have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See* Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* 11-14, 133-34, 164-65, 183 (2003) (discussing role of WJC in the Holocaust restitution cases); Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II* 52-59, 129-36, 293-314 (2003) (same; author was Deputy Treasury Secretary and Presidential Envoy on Holocaust restitution during the Clinton Administration).

violations of the law of nations, particularly since ATCA claimants often cannot seek justice in their home countries or in other fora.

SUMMARY OF ARGUMENT

Although lawsuits filed in American courts by Holocaust survivors and heirs of victims to obtain a measure of justice for continuing wrongs arising from World War II ("the Holocaust Litigation") present one of the best known uses of the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, Petitioner, the United States, and their *amici* hardly mention it in their catalogues of ATCA cases. *See, e.g.*, Brief of the United States as *Amicus Curiae* at 47-48 (enumerating ATCA cases). No wonder: the Holocaust cases do not fit the profile of the "parade of horribles" they seek to represent as ATCA litigation. Far from objecting to the Holocaust Litigation, the Executive Branch enthusiastically participated in the resolution of these cases, and Congress declared its support.

The Ninth Circuit's interpretation of the ATCA is correct. It accords with the prevailing view that customary international law – what was called "the Law of Nations" when the ATCA was enacted – is part of the common law. Those who framed the ATCA understood that to be the case, and available Legislative and Executive Branch pronouncements and nineteenth-century case law are fully supportive, as are this Court's rulings in *First National City Bank v. Banco Para El Amercio Exterior de Cuba*, 462 U.S. 611, 623 (1983), and *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 495 (1964).

The position of the present Administration departs from the hitherto uniform position of the Executive Branch for the last fifty-plus years recognizing the ability of federal courts to hear disputes that may implicate

American relations with other sovereigns. It also contradicts Congress's affirmation in enacting the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 App., Pub. L. No. 102-256, 106 Stat. 73 (1992), that the ATCA "should remain intact to permit suits based on . . . norms that already exist or may ripen in the future into rules of customary international law." 102 H. Rep. 367 (1991).

It is unnecessary to vitiate the ATCA when deference to the political branches is appropriate. Well-developed mechanisms like the act of state doctrine, the political question doctrine, sovereign and other immunities, and the doctrine of *forum non conveniens* provide the federal courts with sufficient means to defer to the political branches on a case-by-case basis when warranted.

Nor do ATCA claims impinge on legitimate corporate business interests. Where, as in the Holocaust cases, the claims are substantial, the ATCA properly endows federal courts with the authority to provide remedies for injustice and grievous injury. For these reasons, the Court should affirm the judgment below.

ARGUMENT

Amici adopt Respondent's brief, and submit the following additional argument.

I. THE ALIEN TORT CLAIMS ACT ENABLED VICTIMS OF THE HOLOCAUST TO BRING WELL-FOUNDED CLAIMS FOR VIOLATIONS OF "THE LAW OF NATIONS" IN U.S. COURTS WITH THE SUPPORT OF THE EXECUTIVE BRANCH AND OF CONGRESS

The ATCA's provision of a private right of action enabled Holocaust survivors and heirs of victims to claim restitution in the late 1990s through a series of actions

brought in U.S. courts (the "Holocaust Litigation").[3] The Holocaust Litigation was brought against Swiss, German, Austrian, French, and other banks and institutions that converted Holocaust victim assets or laundered stolen gold, as well as against industrial entities that participated in and implemented slave and forced labor and "work-to-death" programs and/or medical experiments on Holocaust victims. Ultimately, these entities acknowledged their complicity in the crimes of the Nazis and provided, collectively, roughly $8 billion in compensation and other relief. *Neuborne*, *supra* note 3, at 795.

It is now common knowledge that Swiss and other European financial institutions benefited financially from Nazi-era atrocities.[4] The Independent Commission of Experts ("ICE") was created by the Swiss parliament in December 1996 to examine the complicity of Swiss institutions with the National-Socialist regime and to assess the global scale of the problem of looted and stolen assets located in Switzerland. The ICE recounted in its final report:

> Using the pretext of their duty to protect private property rights, the banks were able to dodge all efforts to conduct serious searches for such

[3] For examples of the actions filed, *see* Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 Wash. U. L.Q. 795, 796 n.2 (2002).

[4] *See, e.g.*, Independent Committee of Eminent Persons, chaired by Paul A. Volcker, *Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks* 2 (Dec. 6, 1999), *available at* http://www.icep-iaep.org/final_report/ [hereinafter "Volcker Report"]; *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II* at iii, prepared by William Z. Slany and coordinated by Stuart E. Eizenstat (May 1997) [hereinafter "Eizenstat Report"].

> ["dormant"] accounts and their owners, and to dismiss applications for restitution from heirs who were unable to prove their title with all the requisite formal evidence. . . . This held true despite the fact that it was in most cases plainly impossible for legitimate heirs, and for the organisations representing the murdered heirs, to procure information such as official death certificates and account numbers. The bankers acknowledged the problem, but opposed any general attempt at regulation for a long period, and did so with success.[5]

In 1996 and 1997, Holocaust survivors and heirs of victims who had deposited money in Swiss bank accounts commenced three class actions against Swiss banks with ties to the United States in the Eastern District of New York. These cases were consolidated before the Honorable Edward R. Korman in the United States District Court for the Eastern District of New York as *In re Holocaust Victim Assets Litigation*, No. CV-96-4849 (E.D.N.Y. filed June 16, 1997).[6]

The parties to the consolidated actions reached a settlement under the court's supervision. *See In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 142 (E.D.N.Y. 2000). In exchange for the release of legal claims against the Swiss banks and other Swiss entities, the banks agreed to pay $1.25 billion to various classes of victims, including persons who had deposited assets in

[5] Independent Commission of Experts Switzerland – Second World War, *Switzerland, National Socialism, and the Second World War. Final Report* 512 (Pendo Editions, Zurich, 2002).

[6] *See* Bazyler, *supra* note 2, at 1-58; Morris A. Ratner, *The Settlement of Nazi-era Litigation Through the Executive and Judicial Branches*, 20 Berkeley J. Int'l L. 212 (2002).

Switzerland and their heirs, persons whose assets were looted by the Nazis and laundered through Swiss institutions, slave and forced laborers whose labor generated revenue that was deposited in Swiss accounts, and refugees from Nazi persecution who were denied entry into Switzerland or who were deported from Switzerland. *Id.* at 143-44.

The U.S. Department of Justice expressed its "unqualified support" for the class action settlement, stating that the settlement "is fair and just and promotes the public interest." *Id.* at 148, *quoting* Transcript of Fairness Hearing (Nov. 29, 1999) at 27, 31 (comments of James Gilligan, U.S. Department of Justice, on behalf of the United States). At present, distribution of the settlement is continuing, under the supervision of Judge Korman.

The class of plaintiffs suing the Swiss banks included not only Holocaust survivors residing in the United States, but also Holocaust survivors residing abroad. These alien plaintiffs brought their claims under the ATCA. *See* Bazyler, *supra* note 2, at 55; *see also* Eizenstat, *supra* note 2, at 279-337 (describing subsequent litigation and settlements with German, Austrian, and French banks).

Like the Swiss banks, German companies profited enormously during the Second World War from the victimization of Jews and other minorities. According to Professor Ulrich Herbert, "[t]he National Socialist 'Ausländereinsatz' [use of foreigners] between 1939 and 1945 represents the most sizable case of the massive and forced use of foreign workers in history since the end of slavery in the nineteenth century."[7]

[7] Excerpt from Ulrich Herbert, *Hitler's Foreign Workers: Enforced Foreign Labor in Germany under the Third Reich* (1997), *reprinted in*
(Continued on following page)

The German government did not compensate slave or forced laborers after World War II: "None of the German laws provided any indemnity for the labor [of] the concentration camp inmates. . . . No special recognition was accorded to the fact that large numbers of human beings had been subjected to conditions of slavery." Benjamin B. Ferencz, *Less Than Slaves: Jewish Forced Labor and the Quest for Compensation* at xxv (reprint ed. 2002). The government maintained that it bore no responsibility for the enrichment of private industry, while German industry insisted that responsibility fell on the government's shoulders. *See* Michael J. Bazyler, *Litigating the Holocaust*, 33 U. Rich. L. Rev. 601, 613 (1999). Millions of victims were denied redress.

In 1997, the first of dozens of lawsuits was filed against German companies for violations of customary international law. These suits were consolidated in a Multi-District Litigation proceeding before the Honorable William G. Bassler of the United States District Court for the District of New Jersey. *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000). The plaintiffs included American citizens and foreign nationals. The foreign national plaintiffs relied on the ATCA as the basis for subject matter jurisdiction.

Some claims were dismissed on political question and other case-specific grounds unrelated to the scope of the ATCA. *E.g.*, *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 483 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999). The plaintiffs in all the cases worked closely with Executive Branch officials,

the *Frankfurter Allgemeine Zeitung* (March 16, 1999), *available at* http://www/ess.uwe.ac.uk/genocide/slave_labour13.htm.

victims' advocates such as the World Jewish Congress, and defendants to craft a reasonable settlement to resolve their claims. *See* John Authers & Richard Wolffe, *The Victim's Fortune: Inside the Epic Battle Over the Debts of the Holocaust* 225 (2002).

Litigation against German companies for Nazi-era violations produced significant benefits for survivors. The German government and German companies jointly agreed to create a $5 billion fund to compensate Holocaust victims who suffered at the hands of German entities, to provide an official apology to each victim, and to establish educational programs. In exchange, they obtained voluntary dismissal of the plaintiffs' claims and an Executive Agreement in which the United States agreed to file papers seeking dismissal of future suits in deference to the German Foundation "Remembrance, Responsibility and the Future." *See In re Nazi Era Cases*, 198 F.R.D. 429. The Executive Branch willingly played a significant role in the resolution of the Holocaust cases, and the Legislative Branch declared its support. *See* Resolution Expressing Support for U.S. Government Efforts to Identify Holocaust-Era Assets, 1998 H. Res. 557 (Sept. 29, 1998).[8]

The ATCA provides subject matter jurisdiction and a private right of action to victims of the most egregious human rights abuses. If this Court adopts Petitioner's excessively narrow reading of the ATCA, this avenue of redress will be lost.

[8] *See also* Eizenstat, *supra* note 2, at 213-78, 287-337 (discussing Executive Branch's extensive support for and involvement in the litigation and settlement of the Holocaust cases).

II. THE ATCA PROVIDES BOTH JURISDICTION AND A PRIVATE RIGHT OF ACTION FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW

A. The Ninth Circuit's Interpretation of the ATCA Does Not Undermine the Separation of Powers.

1. The Prevailing View of Customary International Law as Federal Common Law Enforceable Under the ATCA Does Not Impede Congressional Law-Making.

Petitioner contends that the Ninth Circuit's interpretation of the ATCA accords federal courts illegitimate law-making authority. Federal courts, however, have been entrusted from the earliest days of the Republic with the authority to interpret and apply customary international law, first as part of the general common law, and now as part of federal common law.

The Framers assigned Congress the power to "define and punish . . . offences against the Laws of Nations," U.S. Const. art. I, sec. 8, cl. 10, but they did so with the intention that the courts continue to interpret and apply customary international law as part of the common law, without a specific grant of statutory authority. The Framers, many of whom were lawyers, were part of a tradition in which it was "an ancient and salutary feature . . . that the Law of Nations is a part of the law of the land, to be ascertained and administered, like any other, in the appropriate case." Edwin Dickenson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Penn. L. Rev. 26, 26 (1952). They were well-versed in the highly influential treatise of Sir William Blackstone, who summarized the common-law understanding that "the law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the

land." 4 W. Blackstone, *Commentaries on the Laws of England* 67 (1769); *see* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819, 824, 834 (1989) ("There is no reason to suppose that only one branch of the federal government was responsible for interpreting the law of nations.").

The ratification of the Constitution did not alter the status of the law of nations as common law subject to adjudication by the courts. Alexander Hamilton maintained that "[i]t is indubitable, that the customary law of European nations is a part of the common law, and, by adoption, that of the United States." Hamilton, *Letters of Camillus*, No. 20 (1795), *quoted in* Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740, 742 (1939); *see also* 1 Op. Att'y Gen. 57, 59 (1795) (aliens injured in an attack on a British colony in violation of a treaty of neutrality clearly have "a remedy by *civil* suit in the courts of the United States") (emphasis in original).

Section 9 of the Judiciary Act of 1789, the same section that set forth what became the ATCA, gave the federal courts jurisdiction over common law crimes. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 73 (1923). Placed in such proximity, the grant of jurisdiction for "original jurisdiction of any civil action by an alien for a tort . . . committed in violation of the law of nations" is logically read as recognizing that the law of nations is part of the common law. *See* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 Hastings Int'l & Comp. L. Rev. 221, 232 (1995-96).

Throughout the nineteenth century, both state and federal courts interpreted and applied customary international law as part of the common law. *See Huntington v.*

Attrill, 146 U.S. 657, 683 (1892) ("the question of international law . . . is one of those questions of general jurisprudence which that court [in which the suit is brought] must decide for itself"); *Swift v. Tyson*, 41 U.S. 1 (1842) (declaring the law merchant, or general principles of commercial law, to be part of the general common law). Indeed, in several cases the Supreme Court denied review of state court determinations of international law, reasoning that such decisions did not raise a federal question but rather presented issues of "general law." *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 163 (1894); *New York Life Ins. Co. v. Hendren*, 92 U.S. 286 (1875); *see also* Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1558 n.18 (1984) (citing cases). The Court confirmed these holdings in *The Paquete Habana*: "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." 175 U.S. 677, 700 (1900).

The renunciation of a federal general common law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), did not affect the rule in *The Paquete Habana* that federal courts are to interpret customary international law as part of the federal common law. Moreover, *Erie* is a case about federalism. No federalism issues are presented when, as here, customary international law is enforced in a federal court, since primary responsibility for enforcing international law belongs to the national government.

Erie heralded the beginning of a genuine federal common law, as opposed to a general common law applied by state and federal courts alike. *See Texas Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (distinguishing between federal common law and general common law); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S.

398, 426 (1964) (same); *see also* Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 Fordham L. Rev. 393, 433 (1997). To suggest that *Erie* excised customary international law from the fabric of federal common law is to mistake a case about federalism for a case about the separation of powers within the federal government.

This Court's decision in *Banco National de Cuba v. Sabbatino*, 376 U.S. 398 (1964), put to rest any doubt that customary international law is part of federal common law. The Court observed that, although there is no general federal common law, "there are enclaves of federal judge-made law which bind the states." *Sabbatino*, 376 U.S. at 426. In *Sabbatino*, the Court applied the act of state doctrine and declined to adjudicate a claim against the Cuban government. In doing so, the Court cited with approval International Court of Justice Judge Jessup's "caution[] that rules of international law should not be left to divergent and perhaps parochial state interpretations." *Id.* at 425. Petitioner's reading of *Erie*, by contrast, compels the conclusion that customary international law lies within the purview of state courts, a conclusion this Court has rejected.[9]

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[9] The vast majority of commentators agree that *Erie* did not place the interpretation and application of customary international law beyond the authority of the federal courts. *See, e.g.*, Ryan Goodman & Derek Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463 (1997); Stephens, *supra*; Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998); Frederic L. Kirgis, *Federal Statutes, Executive Orders and "Self-Executing Custom"*, 81 Am. J. Int'l L. 371 (1987); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. Cin. L. Rev. 367 (1985); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555 (1984).

The *Sabbatino* Court established a "sliding scale" whereby federal courts can determine whether to adjudicate issues of international law: "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." *Sabbatino*, 376 U.S. at 428. The "sliding scale" *requires* courts to interpret customary international law to determine whether the act of state doctrine precludes exercise of the court's subject matter jurisdiction. *See id.* at 467 n.26 (White, J., dissenting); *see also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976). If customary international law were not part of federal common law, courts could not legitimately perform this task.

Citing to *The Paquete Habana*, and thereby confirming the continuing vitality of this case after *Erie*, the Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* noted that "international law . . . 'is part of our law,'" and that "the principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed . . . by international law principles. . . . " 462 U.S. 611, 623 (1983); *see also Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941). The Court reiterated this understanding in *Texas Industries v. Radcliff Materials*: "[F]ederal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." 451 U.S. 630, 641 (1981). In a number of other cases, the Court has applied and interpreted customary international law, an illegitimate exercise were customary law not part of federal common law. *E.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting) (stating that "the practice of using international law to limit the extraterritorial reach

of statutes is firmly established in our jurisprudence"); *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992) (interpreting the U.N. Convention on the Law of the Sea); *United States v. Louisiana*, 394 U.S. 11, 22 (1969) (applying "generally accepted principles of international law").

The enforceability of customary international law under the ATCA can thus be thought of in two ways: (1) the ATCA can be read as creating a statutory cause of action for the enforcement of the law of nations; and/or (2) the law of nations can be viewed as judicially enforceable federal common law, with the ATCA merely providing a specific form of subject matter jurisdiction.

A number of lower courts have held that federal common law incorporates customary international law. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (describing the "settled proposition that federal common law incorporates international law"); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) ("It is . . . well settled that the law of nations is part of federal common law."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (D.C. Cir. 1984) (Bork, J., concurring) ("International law, [appellants] point out, is part of the common law of the United States. This proposition is unexceptionable."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995).

Both the Executive and Legislative branches have corroborated this understanding. Brief for the United States as *Amicus Curiae* at 1, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19 I.L.M. 585, 606 n.49 (1980) ("Customary international law is federal law, to be enunciated authoritatively by the federal courts."); S. Rep. No. 102-249, at 6 n.6 (1991) (indicating, in legislative history of the TVPA, that "[i]nternational human rights cases predictably raise legal issues . . . that are matters of

Federal common law and within the particular expertise of Federal courts").

The *Restatement (Third) of the Foreign Relations Law of the United States* indicates that "the modern view is that customary international law in the United States is federal law. . . . " *Restatement* § 111 rept. note 3 (1987). Therefore, "[c]ases arising under international law . . . are within the Judicial Power of the United States. . . . " *Id.* § 111(2). The Court has repeatedly relied upon the *Restatement* as an authoritative declaration of the foreign affairs law of the United States. *E.g., C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 421 n.3 (2001); *Weinberger v. Rossi*, 456 U.S. 25, 28 n.5 (1982).

Against this overwhelming consensus, and contrary to *Sabbatino*, a minority of scholars and a single appellate judge dispute the federal common law status of customary international law. *See Al Odah v. United States*, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (Randolph, J., concurring); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997). Petitioner and its *amici* cite Professors Bradley and Goldsmith in support of their position. *See, e.g.,* Brief of Petitioner at 31; Brief of Washington Legal Foundation, et al. as *Amici Curiae* at 18, 25. Bradley and Goldsmith contend that *Erie* "requires federal courts to identify the sovereign source for every rule of decision." *Id.* at 852. Since customary international law lacks a positivist source, they claim, federal courts cannot apply it in the absence of domestic authorization to do so. *Id.* at 853.

The contention of Bradley and Goldmith that customary international law is not federal common law contains several irredeemable flaws. First, Bradley and Goldsmith ignore rulings by this Court, notably in *First National City*

Bank, 462 U.S. 611, that customary international law is part of federal common law, and they read *Sabbatino* too narrowly.

Second, by insisting that customary international law is part of the general common law renounced in *Erie*, Bradley and Goldsmith, by their own admission, assign the interpretation and application of customary international law to state courts. Bradley & Goldsmith, *supra*, at 870. The Framers expressly rejected this result. John Jay wrote: "The wisdom of the convention, in committing such questions [involving the 'laws of nations'] to the jurisdiction and judgment of courts appointed by and responsible only to one national government, cannot be too much commended." *The Federalist* No. 3 (John Jay); *see also The Federalist* No. 80 (Alexander Hamilton) ("the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned").

Bradley and Goldsmith cite *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), in which the Court permitted California to set its own tax policies for multinational corporations, for the proposition that the Court is turning towards a more federalist approach to foreign affairs. Bradley & Goldsmith, *supra*, at 866. In fact, the Court has recently rejected states' interference in foreign affairs. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000); *see also American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2390 (2003). Moreover, Bradley and Goldsmith commit the same fallacy in analyzing *Barclays Bank* that they do in analyzing *Erie*, using a case about federalism to draw inferences about the very different issue of the separation of powers among the branches of the federal government.

Preserving federal courts' ability to adjudicate causes of action based on customary international law under the

ATCA does not raise the federalism concerns that animated this Court's recent decision in *American Insurance Association v. Garamendi*, 123 S. Ct. 2374 (2003). In that decision, Justice Souter's majority opinion and Justice Ginsburg's dissenting opinion disagreed on the degree of clarity and explicitness required for an action by the Executive Branch to preempt action by state legislatures in a particular area. Justice Ginsburg distinguished *Crosby*, 530 U.S. 363, as a statutory preemption case, while Justice Souter emphasized that the German Foundation Agreement could not work unless, in the words of Deputy Secretary Eizenstat, "'German industry and the German government [are] assured that they will get "legal peace," not just from class-action lawsuits, but from the kind of legislation represented by the *California Victim Insurance Relief Act*.'" *Garamendi*, 123 S. Ct. at 2385.

The Executive Branch in negotiating the German Foundation Agreement clearly upheld the authority and independence of the courts to determine when to decline to adjudicate in light of U.S. foreign policy interests, that being "an issue for the courts." *Id.* at 2382. Rather than attempting to excise Holocaust-era claims from the purview of federal jurisdiction or to allege that such claims are not cognizable absent supplemental legislation by Congress, the Executive evinced its trust in the courts to use the tools available to them to defer to the other branches when appropriate, a trust that has proven well-placed. This Court's holding in *Garamendi* that the California HVIRA was preempted by the Executive's prior action does not bear on the question at issue here, namely, whether federal courts should be deprived of the ability to adjudicate questions of customary international law under the ATCA.

2. Subsequent Congressional Ratification of *Filartiga* Confirms the Prevailing Understanding of the ATCA Followed by the Ninth Circuit.

Congress has supported the involvement of courts in issues of international law in general and in ATCA cases in particular. If Congress shared Petitioner's concern that international human rights litigation treads impermissibly into a domain reserved for the legislative branch, one would not expect such support. Most notably, by enacting the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 App., Pub. L. No. 102-256, 106 Stat. 73 (1992), Congress placed its express imprimatur on the type of ATCA litigation upheld by the Ninth Circuit here. Consistent with this approach, Congress supported the Holocaust Litigation settlements as "significant first steps in the international effort to provide belated justice to survivors and victims of the Holocaust and their heirs." Resolution Expressing Support for U.S. Government Efforts to Identify Holocaust-Era Assets, 1998 H. Res. 557 (Sept. 29, 1998).

The authoritative legislative history of the TVPA is telling. It is well-established that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill. . . . " *Garcia v. United States*, 469 U.S. 70, 76 (1984). The House Conference Report evinces Congress's endorsement of the prevailing understanding that the ATCA contains a private right of action for torts committed in violation of customary international law. It also indicates that, by enacting the TVPA, Congress intended to extend to U.S. citizens civil remedies for violations of customary international law – remedies that were already available to aliens under the ATCA:

> [C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

102 H. Rep. 367 (1991). The Senate Conference Report contains similar language. 102 S. Rep. 249 (1991). Senator Arlen Spector (R-Pa), the bill's sponsor in the Senate, stated explicitly that the TVPA was enacted to avoid the type of narrow construction urged by Petitioner here:

> One might think, Mr. President, it would be unnecessary to have legislation on such a subject, because torture is such a heinous offense, such a heinous crime, that the courts would have jurisdiction without a formal legislative measure. This is necessary because of litigated cases in the field, most particularly a decision by the court of appeals for the District of Columbia circuit [in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)].

137 Cong. Rec. S 1378.

A number of lower courts have agreed that the enactment of the TVPA signals Congress's manifest approval of the international human rights litigation opposed by Petitioner.[10] Similarly, commentators have recognized the

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[10] *E.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.2d 88, 104 (2d Cir. 2000) ("In passing the [TVPA], Congress expressly ratified our holding in *Filartiga*. . . . "); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) ("In enacting the TVPA, Congress endorsed the *Filartiga* line of cases. . . . "); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (holding that the TVPA confirms the *Filartiga* line of cases); *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 910 (N.D. Ill. 2003); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 442-43 (D.N.J. 1999); *Xuncax v.*

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TVPA as an explicit endorsement of *Filartiga*. *See, e.g.*, Richard H. Fallon, et al., *The Federal Courts and the Federal System* (Hart and Wechsler) 810 (4th ed. 1996) (observing that Congress passed the TVPA "[i]n part to eliminate . . . doubts" about *Filartiga*'s correctness).

Congress's enactment of the TVPA lays to rest any concern that the Ninth Circuit's interpretation of the ATCA treads impermissibly into territory reserved for Congress.

3. The Ninth Circuit's Interpretation of the ATCA Does Not Impede the Executive Branch's Conduct of Foreign Affairs as Indicated by the Hitherto Uniform Position of the Executive Branch.

Although the current Administration argues that adjudication of ATCA cases in the absence of additional legislative authorization undermines the President's ability to conduct foreign affairs, previous administrations under both Republican and Democratic presidents have consistently upheld the ability of courts to hear disputes implicating U.S. relations with other sovereigns. In *Alfred Dunhill of London, Inc. v. Republic of Cuba*, the Court determined that the act of state doctrine announced in *Sabbatino* does not prevent courts from adjudicating disputes involving foreign states as defendants when the acts complained of are commercial, not political, in nature. 425 U.S. 682, 698 (1976). In so holding, the Court quoted a State Department letter issued during the Administration

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Gramajo, 886 F. Supp. 162, 181 (D. Mass. 1995) ("[I]n enacting the TVPA, Congress has expressed its approval of the *Filartiga* line of cases. . . . ").

of President Truman, which urged that the Court abandon the act of state doctrine entirely:

> In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. Thus, it is our view that if the Court should decide to overrule the holding in *Sabbatino* so that acts of state would thereafter be subject to adjudication in American courts under international law, we would not anticipate embarrassment to the conduct of the foreign policy of the United States.

Alfred Dunhill, 425 U.S. at 710-11 (quoting State Department Letter). The Executive Branch explicitly disavowed any separation of powers concerns in urging the Court to interpret and apply international law: "This Department is of the opinion that there would be no embarrassment to the conduct of foreign policy if the Court should decide in this case to adjudicate the legality of any act of state found to have taken place and to make such adjudication in accordance with any principle of international law found to be relevant." *Id.* at 710. The Reagan Administration echoed this view in an *amicus* brief filed in a later act of state case. *See Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422, 427-28 (6th Cir. 1984) (citing a joint Departments of State, Justice, and Treasury *amicus* brief disclaiming that the adjudication of a commercial dispute involving another sovereign state would interfere with an Executive Branch prerogative).

In 1988, the Reagan Administration, in *United States v. Shakur*, 690 F. Supp. 1291 (S.D.N.Y. 1988), urged a district court to interpret customary international law to find that a criminal defendant was not a prisoner of war.

See Koh, *supra*, at 1842 n.96 (describing the State Department's memorandum).

The Nixon Administration earlier had gone even further. In 1969, it urged a state court to apply and interpret customary international law. *See* Gerald L. Neuman, *Sense and Nonsense About Customary International Law*, 66 Fordham L. Rev. 371, 377 (1997) (describing the Nixon Administration's *amicus* brief to the New York Court of Appeals in *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969)).

Consistent with this support for federal adjudication in areas touching upon foreign affairs, the Carter Administration filed a brief *amicus curiae* on behalf of the plaintiff in *Filartiga v. Pena-Irala*, a case against a Paraguayan citizen living in the United States for having tortured and killed the plaintiff's seventeen-year-old brother in Paraguay, in retaliation for their father's political beliefs and activities. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980). The brief encouraged the court to give effect to international human rights norms:

> [N]ot every case or controversy which touches foreign relations lies beyond judicial cognizance. Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government.

Brief for the United States as *Amicus Curiae*, *Filartiga v. Pena-Irala*, *reprinted in* 19 I.L.M. 585, 603 (1980).

The Clinton Administration in a Statement of Interest filed in 1995 and signed by the Solicitor General and the State Department's Legal Advisor likewise expressly disclaimed any concern that the court, by hearing the *Kadic* case involving claims against Radovan Karadzic for genocide, war crimes, and crimes against humanity in the former Yugoslavia, would trespass into an area committed

to the sole purview of the Executive Branch: "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them." *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (quoting Statement of Interest from State Dept. and Solicitor General).

Finally, in this very case, the Clinton Administration earlier filed an *amicus* brief that did not dispute courts' proper authority to entertain ATCA claims. *See generally* United States Dept. of State, Brief *Amicus Curiae*, *Alvarez-Machain v. Sosa*, No. 99-56880 (Mar. 2000).

The current Administration's disapproval of ATCA litigation amounts to a sudden and erroneous about-face of consistent, decades-old Executive Branch policy of support for federal courts' authority to interpret and apply customary international law.

4. Adoption of Petitioner's Position Is Unnecessary Because Courts Can Decline to Adjudicate on a Case-by-Case Basis When Deference to the Political Branches Is Appropriate.

Courts have recourse to a variety of mechanisms for insuring that they do not decide matters that may complicate the conduct of foreign affairs or violate the separation of powers. Noting that "it is error to suppose that every case or controversy which touches upon foreign relations lies beyond judicial cognizance[,]" the Court in *Baker v. Carr* instructed the federal judiciary to apply a case-specific analysis to determine whether to adjudicate:

> Our cases in this field seem invariably to show a discriminating analysis of the *particular question posed*, in terms of the history of its management

> by the political branches, of its susceptibility to judicial handling in light of its nature and posture *in the specific case*, and of the possible consequences of judicial action.

369 U.S. 186, 211-12 (1962) (emphasis added).

Petitioner ignores this instruction to consider the particulars of a specific case and contends that any ATCA litigation that proceeds without positive authorization by Congress and the President should be barred. A case-by-case analysis is a far better strategy to insure against interference with Executive prerogative than an across-the-board prohibition of court action, as it better gives effect to Congress's intent in enacting the ATCA and the TVPA.

Courts have multiple tools for determining whether adjudicating a particular case would unduly interfere with the political branches' prerogative. First, courts refuse to interpret and apply customary international law unless it is well-settled and unambiguous. As indicated above, the Court in *Sabbatino* "refused [to] lay[] down or reaffirm[] an inflexible and all-encompassing rule" and instead articulated a sliding scale by which courts can judge whether they should adjudicate a dispute that might raise separation of powers concerns: "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." *Sabbatino*, 376 U.S. at 428. Following this directive, the Second Circuit requires that a plaintiff allege a violation of a "clear and unambiguous" rule of customary international law in order to state a claim under the ATCA. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 160 (2d Cir. 2003) (dismissing an ATCA claim for violations of the "right to life" and the "right to health" as "insufficiently definite"). The Ninth Circuit likewise reaffirmed in this case that

"[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory." *Alvarez-Machain v. United States*, 331 F.3d 604, 647 (9th Cir. 2003), *quoting Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994). Courts also take account of Executive Branch statements about which international norms are binding, as this Court did with respect to the effect of cross-border abduction on a defendant's susceptibility to trial in the first case involving the actions in question here. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

A second mechanism for deferring is the act of state doctrine, which federal courts invoke if adjudicating a particular claim would invalidate a foreign sovereign's official acts within its own territory. *Sabbatino*, 376 U.S. at 416. The act of state doctrine does not strip courts of the authority to entertain disputes touching upon foreign affairs, but rather provides a rule of decision. As this Court indicated in *Ricaud v. American Metal Co.*, the rule that "the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory . . . does not deprive the courts of jurisdiction once acquired over a case." 246 U.S. 304, 309 (1918). The act of state doctrine "reflect[s] the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Sabbatino*, 376 U.S. at 427-28. The judiciary maintains its congressionally-sanctioned authority to hear international disputes, while remaining sensitive to the prerogatives of the Executive.

Third, the political question doctrine is available to assuage Petitioner's concerns, including the concern that courts will somehow interfere with the war on terrorism by entertaining ATCA lawsuits. At least two ATCA cases have been dismissed pursuant to the political question

doctrine, to avoid "placing the court in the position of announcing a view that is contrary to that of a coordinate branch of government[.]" *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1198-99 (C.D. Cal. 2002); *see also Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 490 (D.N.J. 1999). Another non-ATCA Holocaust case was dismissed pursuant to the political question doctrine, where the court found that a treaty preempted judicial cognizability. *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 282 (D.N.J. 1999).

Fourth, courts have invoked doctrines of sovereign immunity to dismiss claims against foreign sovereigns brought pursuant to ATCA. *See, e.g., Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003); *Ge v. Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000). The United States itself is not subject to ATCA claims, as courts have uniformly held that the United States has not waived its sovereign immunity under the ATCA. *E.g., Sanchez-Espinosa v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985); *Jama v. INS*, 22 F. Supp. 2d 353, 365 (D.N.J. 1998). Courts have also used immunity doctrines to dismiss claims brought against U.S. officials. *Sanchez-Espinosa*, 770 F.2d 202 at 207. These tools enable courts to avoid adjudicating sensitive questions, such as those that might be raised by American anti-terrorism policies, on a case-by-case basis, without renouncing entirely the authority to continue adjudicating cases under the ATCA.

Last, courts can use their discretionary power under the doctrine of *forum non conveniens* to dismiss a case which they feel should be more properly handled by a foreign court. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).[11]

The image of a power-hungry and insensitive federal judiciary complicating foreign affairs is a shibboleth with no basis in the lived experience of litigation under the ATCA.

B. The Ninth Circuit's Interpretation of the ATCA Does Not Impede Legitimate Corporate Interests.

Acknowledging that the ATCA provides both jurisdiction and a private right of action for violations of customary international law does not impinge on legitimate corporate interests or wreck havoc with U.S. economic policy. The alleged harm remains purely in the realm of the hypothetical. As set out above, federal courts have dismissed ATCA cases that lack sufficient foundation on the facts or the law, just as they have other types of cases. Were every cause of action that could entail corporate liability removed from the scope of federal adjudication, little would remain.

To the extent that corporations' conduct does not violate customary international law, including international human rights law, there is no reason for concern. To the extent that their conduct is questionable, there is a body of case law under the ATCA that indicates what types of conduct, and what degree of complicity, entail corporate

[11] In fact, Professors Bradley and Goldsmith, in their recently published casebook, themselves recognize the above-cited self-restraints placed by courts when dealing with the subject of international law; what they label "foreign relations law." Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law: Cases and Materials* 39-105 (2003).

responsibility in U.S. courts. *See, e.g., Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 154-58 (2d Cir. 2003).

While most American corporations do not engage in human rights abuses abroad, those that do are liable under common law tort theories for claims brought by aliens in United States courts. The ATCA is a false target in this regard.

Violations of federal common law cognizable under the ATCA are not qualitatively different from violations of any other common law standards that mature with the accumulation of judgments by common-law courts and the evolution of societal practices. Justice Breyer has recounted Justice Jackson's experience at the Nuremberg trials:

> [A]s a judge, Robert Jackson understood the value of precedent – what Cardozo called "the power of the beaten path." He hoped to create a precedent that, he said, would make "explicit and unambiguous" what previously had been "implicit" in the law, "that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds . . . is an international crime . . . for the commission [of which] . . . individuals are responsible" and can be punished. He hoped to forge from the victorious nations' several different legal systems a single workable system that, in this instance, would serve as the voice of human decency.

Justice Stephen Breyer, *Keynote Address on Yom Hashoah* (April 6, 1996), *reprinted in* 71 N.Y.U. L. Rev. 1161, 1163 (1996). Developments in the decades following Nuremberg, including utilization of the ATCA civil remedy, have largely vindicated Justice Jackson's ideal.

A static vision of customary international law, which is part of federal common law, ignores the development of global understandings prohibiting atrocities that have

occurred within living memory. These prohibitions are universal, discernible, and binding. Corporations have no better argument for escaping liability for violations of these standards than they do for escaping liability for violations of the antitrust laws, employment discrimination laws, unfair trading practices, or multiple other standards that promote corporate accountability.

The history of the twentieth century is, to a large extent, the story of the gradual elimination of "wrongs without remedies" on the global stage. The Framers, through the ATCA, gave federal courts the authority to participate in this development. Petitioner would have the Court retrench this progress. As Justice Ginsburg has observed, "[n]ational, multinational and international human rights charters and tribunals today play a key part in a world with increasingly porous borders." Justice Ruth Bader Ginsburg, Remarks for the American Constitution Society, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication* 2-3 (Aug. 2, 2003).

Corporations and other private-sector entities – such as the Swiss banks and German companies in the Holocaust Litigation – have benefited greatly from the expanding reach of global communications and transportation, and the lowering of barriers to international commerce and trade. They have also become subject, and accustomed, to multiple layers of regulation and increased accountability for their actions in various parts of the globe. The ATCA is neither unique nor remarkable in this respect, and should not be eviscerated on this basis.

CONCLUSION

For all the above-stated reasons, the Court should affirm the judgment of the court below for Respondents.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE SURVIVING FAMILY MEMBERS OF THE VICTIMS OF THE SEPTEMBER 11, 2001 TERRORIST ATTACKS IN SUPPORT OF RESPONDENTS

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RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1987) 18

James Risen & David Johnston, *A Nation Challenged: The Pennsylvania Crash; 44 Victims are Remembered, and Lauded,* N.Y. TIMES, Sept. 18, 2001, at B11 1

Wendy S. Ross, *Sept. 11 Attacks Were Crimes Against Humanity, Says UNHCR's Robinson*, (Oct. 17, 2002), at http://usinfo.state.gov/topical/pol/terror/01101706.htm 19

William A Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT'L L.J. 907 (2003) 19

Somini Sengupta, *I.N.S. Urges Immigrants to Report the Missing*, N.Y. TIMES, Oct. 6, 2001, at D4 3

September 11th Victims Compensation Fund Award Payment Statistics *available at* http://www.usdoj.gov/victimscompensation/payments_deceased.html ... 6

September 11th Victims Compensation Fund Frequently Asked Questions, *available at* http://www.usdoj.gov/victimcompensation/faq.html 6

September 11th Victims Compensation Fund General Program Information: Q&A's Regarding Lawsuits Against

Terrorist Conspiracy Participants, *available at* http://www.usdoj.gov/victimcompensation/lawsuit_qa.html 6

September 11th Victims List, *at* http://66.223.12.161/september11victims/victims_list.html 2, 3

September 11th Victims: Victims by Country and Citizenship, *at* http://66.223.12.161/september11victims COUNTRY_CITIZENSHIP.htm 4

INTEREST OF THE AMICI CURIAE[1]

The undersigned *amici curiae* are surviving family members of the victims of the terrorist attacks on the United States of September 11, 2001.[2] The *amici curiae* wish to ensure that every survivor of terrorist attacks, and the family members of those who perish in terrorist attacks, regardless of their nationality, are able to pursue civil suits against terrorists. As such, the victims of the September 11th attacks and their surviving family members believe that this Court should interpret the Alien Tort Claims Act, 28 U.S.C. § 1350 (2003) ("ATCA"), consistent with the lower federal courts, as creating both a cause of action and granting jurisdiction to federal courts. Any other interpretation would be patently unjust to foreign nationals harmed by terrorist attacks.

On September 11, 2001, four commercial airliners were hijacked by the terrorist group Al Qaeda. The terrorists crashed two of the hijacked airplanes into the Twin Towers of the World Trade Center in New York City. Several minutes later, they crashed the third hijacked airplane into the Pentagon in Washington D.C. N.R. Kleinfeld, *U.S. Attacked: Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror,* N.Y. TIMES, Sept. 12, 2001, at A1. The fourth hijacked airplane, believed to be aimed at another government target in Washington, D.C., crashed in a field in Pennsylvania after passengers wrestled control of the plane from the hijackers. James Risen & David Johnston, *A*

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1. No counsel for any party authored this brief either in whole or in part, and no persons other than counsel for the amici made any monetary contributions to its preparation or submission. The written consent of the parties to the filing of this brief have been filed with the Clerk.

2. For a list of the *amici* and the family members that were killed in the attacks, see the attached appendix. Any mention of other victims or their families in the brief does not imply their support of it.

Nation Challenged: The Pennsylvania Crash; 44 Victims are Remembered, and Lauded, N.Y. TIMES, Sept. 18, 2001, at B11.

The world watched in horror as the three buildings burned and the Twin Towers collapsed. *See* Kleinfeld, *supra*, at A1. For weeks following the attacks, rescue workers searched and searched for survivors, but only five were found. Dan Barry, *After the Attacks: The Tally; With No Miracle in the Rubble, Hope Shifts Grimly to Acceptance*, N.Y. TIMES, Sept. 17, 2001, at A12. The remains of many of those missing were never recovered. *See September 11th Victims List, at* http://66.223.12.161/september11victims/victims_list.htm._The clean-up effort took eight-and-a-half months to complete. Charlie LeDuff, *Last Steel Column from the Ground Zero Rubble is Cut Down*, N.Y. TIMES, May 29, 2002, at B3. During that time, workers spent twenty-four hours each day, including Thanksgiving, Christmas, and New Years Day, cleaning up the rubble and searching for human remains. *See* Mason Anderson, *Ground Zero Crews Find Relief at Red Cross, at* http://www.disasterrelief.org/disasters/020205groundzero.

The scope and severity of the September 11th terrorist attacks were articulated by President Bush, who declared that:

> [c]ivilized people around the world denounce the evildoers who devised and executed these terrible attacks. Justice demands that those who helped or harbored the terrorists be punished -- and punished severely. The enormity of their evil demands it. We will use all the resources of the United States and our cooperating friends and allies to pursue those responsible for this evil, until justice is done.

National Day of Prayer and Remembrance for the Victims of the Terrorist Attacks on September 11th, 2001: A Proclamation, available at http://www.whitehouse.gov/news/releases/2001/09/ 20010913-7.html.

Subsequently, the U.S. destroyed Al Qaeda's training camps in Afghanistan, and waged war against that country's ruling Taliban regime which provided cover for Al Qaeda. *See Presidential Address to the Nation*, October 7, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html. The U.S. Congress passed sweeping anti-terrorism legislation aimed at the interception and obstruction of terrorist activities, USA PATRIOT Act of 2001, 115 Stat. 272, Pub. L. 107-56 (2001), and established a cabinet-level Department of Homeland Security devoted to the protection of American soil from future terrorist attacks. Homeland Security Act of 2002, Pub. L. 107-296 (H.R. 5005). *See also* President George W. Bush, Remarks at the Signing of the PATRIOT Act (Oct. 26, 2001), *reprinted in President Bush Signs Anti-Terrorism Bill, available at* http://www.whitehouse.gov/news/releases/2001/10/20011026-5.html; Statement by the President (Nov. 19, 2002), *reprinted in President Hails Passage of Homeland Security Legislation, at* http://www.whitehouse.gov/news/releases/2002/11/20021119-4.html.

Approximately 2,996 innocent people died on September 11, 2001.[3] *See* September 11th Victims List, *at* http://66.223.12.161/september11victims/victims_list.html. Most of the victims were U.S. nationals. Among the dead,

3. Many of those missing were never recovered or identified, as they were believed to be undocumented immigrants with no formal personnel records, and whose families, for various reasons, were frightened to come forward. Steven Greenhouse & Mireya Navarro, *After the Attacks: The Hidden Victims; Those at the Towers' Margins Elude List of Missing*, N.Y. TIMES, Sept. 17, 2001, at A11; Somini Sengupta, *I.N.S. Urges Immigrants to Report the Missing*, N.Y. TIMES, Oct. 6, 2001, at D4.

however, were at least 209 foreign nationals.[4] As most of the known victims of the World Trade Center attacks were men in their 30's and 40's, many of them married, the number of pregnant women widowed by the attacks was "believed to be substantial." Mireya Navarro, *A Nation Challenged: The Families; Waiting for Babies Who Will Never Know Their Father*, N.Y. TIMES, Dec. 5, 2001, at B1.

The economic impact of the attacks was especially dire for those who lost their sole means of financial support in the attacks. For example, among those who perished in the Twin Towers were more than seventy food workers who worked at Windows on the World, the restaurant at the top of one of the Twin Towers, whose staff was noted for its "United Nations-like diversity." Shaila K. Dewan, *A Nation Challenged: The Memorials; For the Families, A Chance to Share Tears and Love*, N.Y. TIMES, Oct. 2, 2001, at B1. Their pursuit of the American dream was cut short by the cold-blooded acts of the terrorists. Steven Greenhouse, *A Nation Challenged: Windows on the World; a Showpiece's Survivors Wonder What to do Now*, N.Y. TIMES, Sept. 21, 2001, at B12. Peruvian national, Ivhan Luis Carpio Bautista turned 25 on September 11, 2001. He was so determined to support his family in Peru that he worked as much overtime as he could, even on his birthday. Mr. Carpio Bautista perished in the attacks. Glenn Collins, *A Nation Challenged: The Missing; As Providers, Friends, and Shoulders to Lean On, They Put Others First*, N.Y. TIMES, Sept. 26, 2001, at

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4. Many of those lost were nationals of other countries, including: Australia, Belgium, Brazil, China, Colombia, Ecuador, Phillippines, France, Germany, Ghana, Guyana, Haiti, Honduras, India, Indonesia, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Lebanon, Lithuania, Mexico, Moldova, New Zealand, Nigeria, Peru, Portugal, Russia, Sweden, Taiwan, United Kingdom, Ukraine, Uzbekistan, Venezuela, *September 11th Victims: Victims by Country and Citizenship, at* http://66.223.12.161/september11Victims/COUNTRY_CITIZENSHIP.htm; Sarah Prestwood, *'I'd Rather Have My Husband Back'*, WELLINGTON DOMINION, Sept. 28, 2001, at 9.

B11. Leobardo Lopez Pascual, who worked mornings at Windows on the World, sent money, clothes, and shoes to his wife and four children in Mexico, while he shared a studio apartment with a co-worker. He too perished in the attacks. *Id.* Sophia Addo, another Windows on the World employee, sent hundreds of dollars to her native Ghana each month to support her parents and ten-year-old daughter. *Id.* She too perished in the attacks. These three victims were just a few of the workers who lived paycheck-to-paycheck to support their families. The families of these workers and others like them should be permitted to use the ATCA to sue Al Qaeda for their loss.

Al Qaeda's net worth is not known. *See* Council on Foreign Relations, *The Money: Drying Up the Funds for Terror, in* COUNCIL ON FOREIGN RELATIONS: TERRORISM QUESTIONS AND ANSWERS, *at* http://cfrterrorism.org/responses/money.html. It is known, however, that chief among its sources of financial support is Osama Bin Laden's own personal wealth, believed to be as much as $300 million. *Id.* Some of Al Qaeda's money also comes from wealthy sympathizers who use sophisticated techniques to camouflage the flow of their own assets to Al Qaeda. *Id.* Al Qaeda has also made broad use of illegal activities such as extortion, drug smuggling, and fraudulent charity operations to draw money into its coffers. *Id.* It has also relied on a wide variety of legitimate economic activities to provide cover for its funding of terrorist acts. For example, Al Qaeda has used both the Yemeni honey trade and the traditional *hawala* system of informal community trust banking to both raise money and surreptitiously transfer funds worldwide. *Id.*

It was a terrorist cell of nineteen Al Qaeda operatives that perpetrated the attacks on September 11, 2001. That terrorist cell used $500,000 to pay for false identities, flight-school tuition and, eventually, plane tickets to board the hijacked aircraft. *Id.* This cost is less than a fraction of Al

Qaeda's resources, but arguably more than some victims' families will ever own.

Alien victims of the attack suffered as much as nationals; their families feel the same loss. It is therefore imperative that all of the families of the victims of the September 11th attacks be permitted to pursue suits against Al Qaeda and its vast financial resources.[5] Such lawsuits will not only potentially provide financial compensation to the victims' families, but will also provide a sense of vindication to the family members of the men and women who were murdered on September 11th.

Moreover, to win the war on terror, the United States, and all governments, must take all necessary steps to "cripple terrorist organizations and stem the flow of funds." MAURICE GREENBERG ET AL., TERRORIST FINANCING: REPORT OF AN INDEPENDENT TASK FORCE SPONSORED BY THE COUNCIL ON FOREIGN RELATIONS 34 (2002). Independent lawsuits by victims of terrorist acts can be extremely helpful to the government (which has limited resources) in its effort to track down terrorists and their sources of funding.

SUMMARY OF THE ARGUMENT

The *amici* respectfully request that this Court affirm the Ninth Circuit Court of Appeals' holding that the Alien Tort Claims Act, 28 U.S.C. § 1350, creates a cause of action to sue for a violation of the law of nations. *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003), *cert. granted* 124 S. Ct. 807 (2003).[6] Federal courts over the past twenty-five years have repeatedly and consistently held that ATCA confers on foreign victims of torts a right to sue for violations of the law of nations. *See e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 884-86 (2d Cir. 1980); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996).

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5. Although a number of funds have been established to assist families and survivors of the September 11th attacks, the compensation provided by these funds is inadequate. The federally-funded September 11th Victims Compensation Fund of 2001 was established to provide families of victims and survivors with the opportunity to receive support through financial installments rated to the expected earnings of the deceased or injured over the course of his or her natural lifetime. *September 11th Victim Compensation Fund Frequently Asked Questions, available at* http://www.usdoj.gov/ victimcompensation/faq.html (last updated Feb. 10, 2004). While claimants to this Fund waive right to take suit against the airlines, the United States, or any other non-terrorist entity involved in the attacks, *September 11th Victims Compensation Fund General Program Information: Q&A's Regarding Lawsuits Against Terrorist Conspiracy Participants, available at* http://www.usdoj.gov/victimcompensation /lawsuit_qa.html (last updated May 8, 2003), participation in the fund is no bar to pursuing suits against the terrorist who perpetuated the September 11th attacks.

However, the compensation fund is not without its drawbacks, especially for poorer victims. Because the amount of compensation is tied to the expected earnings of the deceased over the course of their natural lifetime, families of victims who earned less money at the time of the attacks will receive less money in compensation through the Fund. *September 11th Victims Compensation Fund Award Payment Statistics, available at* http://www.usdoj.gov/ victimscompensation/payments_deceased.html (last updated Feb. 25, 2004). Additionally, the deadline for participation in the fund passed on December 22, 2003. *Victims Compensation Fund Frequently Asked Questions, supra*. It is reported that nearly half of those eligible for compensation never applied for a claim. David W. Chen, *As Deadline for 9/11 Aid Nears, Many Relatives Haven't Filed*, N.Y. TIMES, Nov. 22, 2003, at A1. There was confusion over the deadline, the filing time was lengthy and victims' families were simply not emotionally ready to handle the process of filing. *Id.* Though several members of Congress cited this as a major problem, the deadline was never extended, leaving thousands of deserving claimants out in the cold. *Id.*

6. This Court also granted certiorari in the companion case *United States v. Alvarez-Machain*, 124 S. Ct. 821 (2003).

The *amici*, family members of victims who were killed by terrorists on September 11th, believe that the ATCA provides the only meaningful opportunity for foreign nationals who are victims of terrorism, and survivors of those victims, to be compensated monetarily. Permitting victims to sue terrorists civilly for their heinous acts also provides a sense of vindication for terrorism victims and their survivors. The U.S. should avail itself of all means to cripple and eradicate terrorism, including permitting alien victims to sue terrorists and to use their private resources to track down terrorists and their assets.

Amici submit this brief in direct response to the briefs submitted by the Solicitor General and the Petitioner who argue that the ATCA somehow impedes the war on terrorism, and that terrorists could manipulate the ATCA to sue the U.S., U.S. officials, and their allies. Br. for the U.S. at 52-53, Br. for Pet. at 38-39. This argument is baseless. First, the U.S. and other sovereign nations are immune from suit under the ATCA. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985); The Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 (2003). Second, because Congress has mandated that a "principal goal" of U.S. foreign policy is to "promote the increased observance of internationally recognized human rights by all countries," 22 U.S.C. § 2304(a)(1) (2003), it is presumed that the United States, in fighting the war on terrorism, will abide by the law of nations and respect human rights. Finally, U.S. military actions cannot be challenged in federal courts, as they are non-justiciable political questions. *Eminete v. Johnson*, 361 F.2d 73 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 929 (1966).

Congress has had the opportunity to review and repeal the ATCA many times, including, most recently, in the wake of the September 11th attacks when it reorganized our government (creating the Department of Homeland Security), and enacted the comprehensive USA PATRIOT Act. Pub. L.

107-56, 115 Stat. 272 (2001). Had Congress believed that any statute, including the ATCA, could impede the war on terrorism, it would have repealed that statute when it overhauled our laws.

Whereas U.S. citizens may sue terrorists for treble damages pursuant to U.S. statutory law if they are harmed by terrorist attacks, *see* 18 U.S.C. §§ 2331 *et seq.* (2003) (The Antiterrorism Act of 1992), this avenue is foreclosed to foreign nationals. As the U.S. District Court for the District of Columbia recently held, however, foreign nationals may invoke the ATCA to sue terrorists if their acts violate well-recognized norms of customary international law. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 99-100 (D.D.C. 2003) (holding that alien survivors of victims of the September 11th terrorist attacks can sue Al Qaeda because hijacking violates well-established norms of customary international law).

Judicially repealing the ATCA would create two classes of terrorism victims and their survivors: those who can sue for a violation of their rights and those who cannot. Repeal of the ATCA would mean that aliens injured by terrorist attacks within the U.S. could not sue those terrorists. It would also mean that aliens injured by terrorist attacks abroad could not sue terrorists living within our borders. Such disparate treatment of alien victims of terrorist attacks trivializes their suffering and signals that they do not deserve justice.

This dichotomy would not only harm the alien victims and their survivors, but would also call into serious question the U.S.'s moral stature in leading the global fight to eradicate terrorism. It simply cannot be perceived by our allies in the war against terrorism that the U.S. does not wish to protect the interests of their nationals. This would be exactly the kind of result that the ATCA was enacted to prevent.

ARGUMENT

I. THE UNITED STATES, WHICH IS AT THE FOREFRONT OF FIGHTING TERRORISM, SHOULD ENSURE THAT ALL VICTIMS OF TERRORISM ARE ABLE TO SUE TERRORISTS IN U.S. COURTS.

The United States and the international community have a long history of condemning and fighting terrorism. Even before the September 11th attacks, Congress ratified treaties and enacted legislation aimed at fighting international terrorism. By doing so, the United States has established that "[t]he war on terrorism remains our first priority." Colin Powell, *What We Will Do in 2004*, N.Y. TIMES, Jan. 1, 2004, at A25.

In 1998, the United States and seventy-five other nations ratified the International Convention for the Suppression of Terrorist Bombings ("Terrorist Bombings Convention"), *reprinted in* 37 I.L.M. 249 (1998). In 2002, Congress passed legislation implementing the Convention. Pub. L. 107-197, 116 Stat. 721 (H.R. 3275) (codified as 18 U.S.C. § 2332f (2003)). In 1999, the United States joined sixty-four other nations in ratifying the International Convention for the Suppression of the Financing of Terrorism ("Terrorist Financing Convention"), *reprinted in* 39 I.L.M. 270 (1999). In addition, thirty years before the attacks on the Pentagon and World Trade Center, the United States played a leading role in passing the Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking) ("Hague Convention of 1970"), 22 U.S.T. 1641 (1970).

Moreover, under the Omnibus Diplomatic Security and Antiterrorism Act ("ODSAA") of 1986, Congress established extraterritorial criminal jurisdiction for acts of

international terrorism against Americans. Pub. L. 99-399, 100 Stat. 853 (H.R. 4151) (codified as amended in 18 U.S.C. § 2332 (2003)). Upon signing the ODSAA into law, President Ronald Reagan declared that "[t]his mark[ed] yet another step forward in our bipartisan effort to eradicate international terrorism." Statement by President Ronald Reagan (Aug. 27, 1986), *reprinted in* 1986 U.S.C.C.A.N. 1965. President Reagan urged cooperation with all nations to bring an end to terrorism, and stated that "we must remain resolute in our commitment to confront this criminal behavior in every way." *Id.*

A few years later, believing that there was a need for a companion civil legal cause of action for U.S. victims of terrorism, the Judiciary Committee recommended the adoption of the Antiterrorism Act of 1992, to provide a federal cause of action for treble damages for any national of the United States injured by an act of international terrorism.[7] Pub. L. 102-572, 106 Stat. 4506 (S 1569) (codified at 18 U.S.C. § 2333 (2003)). When the legislation was passed, President George H.W. Bush stated that he was "pleased that . . . an American national [will be allowed] to file suit in the United States for the recovery of treble damages against the perpetrators of international terrorism." Statement by President George H.W. Bush (Oct. 29, 1992), *reprinted in* 1992 U.S.C.C.A.N. 3942.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 144-132,

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7. The U.S. District Court for the Southern District of New York recently found that the September 11th terrorist attacks were acts of "international terrorism" as contemplated by this statute, even though the attacks took place entirely within the United States. *See Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217, 225-26 (S.D.N.Y. 2003). The District Court reasoned that the attacks were international in nature because they were carried out by foreign nationals who received their orders, funding, and some training from foreign sources.

110 Stat. 1214 (S 735), to further deter terrorism. President Bill Clinton declared that "[b]y enacting this legislation, the United States remain[ed] in the forefront of the international effort to fight terrorism through tougher laws and resolute enforcement." Statement by President William J. Clinton (Apr. 24, 1996), *reprinted in* 1996 U.S.C.C.A.N. 961-1. Under the AEDPA, Congress waived portions of the Foreign Sovereign Immunities Act of 1976, under specified circumstances, to permit suits in U.S. courts by U.S. citizens against foreign states that engage in acts of terrorism. 28 U.S.C. § 1605(a)(7)(2003). The legislative history shows that Congress enacted the AEDPA to ensure that terrorists restore their victims to their prior state of well-being. S. Rep. 104-179 at 12, *reprinted in* 1996 U.S.C.C.A.N. 924, 931.

Since September 11th, the United States has been at the forefront of the world-wide effort to combat terrorism. First, the U.S. has made significant efforts to combat terrorism within our own borders. We have restructured our own government, creating a new Department of Homeland Security to monitor terrorism and other activities that threaten national security. Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (H.R. 5005) (codified primarily at 6 U.S.C. § 101 (2003)). In addition, the United States Congress passed the USA PATRIOT Act "to deter and punish terrorist attacks in the United States and around the world" and "to enhance law enforcement investigatory tools." Pub. L. 107-56, 115 Stat. 272 (H.R. 3162) (codified as amended in scattered sections of titles 8, 18, 22, 28, 31, 42, 47, and 50 of the U.S. Code).

Second, the United States has worked with and encouraged other nations to condemn terrorism

internationally.[8] The U.S. adopted United Nations General Assembly Resolutions which demand that all States cooperate to fight terrorism. For example, United Nations General Assembly Resolution 58/48, "*Calls upon* all Member States to support international efforts to prevent terrorists from acquiring weapons of mass destruction and their means of delivery."[9] Moreover, at the urging of the U.S., the September 11th terrorist attacks, and terrorist attacks on the UN Assistance Mission for Iraq in Baghdad on August 19,

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8. *See, e.g.*, G.A. Res. 54/110, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/110 (2000); G.A. Res. 54/164, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/164 (2000); G.A. Res. 55/158, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/158 (2001).

9. This strong opposition to terrorism is also illustrated in UN General Assembly Resolutions. In various resolutions bearing essentially the same title, ("Measures to Prevent International Terrorism"), the UN has called for states to take measures against international terrorism when that terrorism "endangers or takes innocent human lives or jeopardizes fundamental freedoms." *See* G.A. Res. 3034(XXVII), U.N. GAOR, 27th Sess., U.N. Doc. A/RES/3034(XXVII) (1972); G.A. Res. 31/102, U.N. GAOR, 31st Sess., U.N. Doc. A/RES/31/101 (1976); G.A. Res. 32/147, U.N. GAOR, 32d Sess., U.N. Doc. A/RES/32/147 (1977); G.A. Res. 34/145, U.N. GAOR, 34th Sess., U.N. Doc. A/RES/34/145 (1979); G.A. Res. 36/109, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/109 (1981); G.A. Res. 38/130, U.N. GAOR, 38th Sess. U.N. Doc. A/RES/38/130 (1983); G.A. Res. 39/159, U.N. GAOR, 39th Sess., U.N. Doc A/RES/39/159 (1984); G.A. Res. 40/61, U.N. GAOR, 40th Sess., U.N. Doc A/RES/40/61 (1985); G.A. Res. 42/159, U.N. GAOR, 42d Sess., U.N. Doc. A/RES/42/159 (1987); G.A. Res. 44/29, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/29 (1989). Similarly, UN Member States have reaffirmed their "unequivocal condemnation" of acts of terrorism, including those that "may jeopardize the security of States." *See* G.A. Res. 49/60, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/60 (1995). *See also* G.A. Res. 49/185, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/185 (1995) (condemning acts of terrorism "aimed at the destruction of human rights"); G.A. Res. 58/81, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/81 (2004) (reaffirming "strong condemnation of the heinous acts of terrorism that have caused loss of human life, destruction, and damage").

2003 were strongly condemned as acts of terrorism in UN resolutions 56/1 and 57/338 respectively. Secretary of State Colin Powell later described the UN's ratification of 56/1 as "the world answer[ing] President Bush's call for a great global coalition against terrorism." Remarks to Security Council of the United Nations (Sept. 11, 2002), *available at* http://www.state.gov/secretary/rm/2002/13407.htm. The General Assembly's strong condemnation of these terrorist acts has been reiterated in subsequent resolutions, in which the United States has reaffirmed its "strong condemnation of the heinous acts of terrorism that have caused enormous loss of human life, destruction, and damage." *See* G.A. Res. 57/27, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/27 (2003) and G.A. Res. 58/81, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/81 (2004).

The U.S.'s condemnation of terrorism is also demonstrated through its funding appropriations. The U.S. has provided significant financial support to international organizations to support their efforts in combating terrorism.[10] Further, the U.S. has sent delegates to participate in international organizations that work to combat terrorism.[11] The U.S.-led international war on terrorism

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10. In January, 2004, the U.S. delegation to the Organization of American States Inter-American Committee Against Terrorism pledged $1.6 million to support the fight against terrorism. Press Release, *U.S. Pledges $1.6 million to the Inter-American Committee Against Terrorism* (Jan. 22, 2004), *at* http://www.state.gov/r/pa/prs/ps/2004/28661.htm.

11. The Department of State declared that sending its Coordinator for Counterterrorism to the Organization of American States Inter-American Committee Against Terrorism "reflects [the U.S.'s] continued commitment to developing a hemispheric strategy to improve security and combat terrorism." Press Release, *Ambassador Cofer Black to Lead the U.S. Delegation to the Fourth Regular Session of the Inter-American Committee Against Terrorism* (Jan. 22, 2004), *available at* http://www.state.gov/r/pa/prs/ps/2004/28429.htm.

strongly reflects the U.S.'s dedication to human rights. Yet, the Petitioner and his amici ask this Court to judicially repeal the very statute that affords aliens the only redress against human rights abuses, including terrorism. This frustrates our national goals and interests and calls into question our moral ability to effectively lead the international war against terror. In keeping with our government's strong objective to fight and end terrorism, all victims of terrorism, regardless of their nationality should be able to sue terrorists and recover monetary damages.

II. TO COMBAT TERRORISM MOST EFFECTIVELY, AND IN KEEPING WITH CONGRESSIONAL INTENT, VICTIMS OF TERRORISM SHOULD HAVE ACCESS TO U.S. COURTS, REGARDLESS OF THEIR NATIONALITY.

As the September 11th attacks showed, terrorist acts against the United States result in death or injury to foreign nationals as well as U.S. citizens. Under our domestic law, American citizens may seek redress through tort actions against terrorists. The Antiterrorism Act of 1992 ("ATA"), 18 U.S.C. §§ 2331 *et seq.* (2003), permits American citizens who were injured "by reason of an act of international terrorism" to bring suit "in any appropriate district court of the United States" and recover treble damages against terrorists. *See also Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1021 (7th Cir. 2002) (those who knowingly finance a terrorist group may be liable); *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 290 F. Supp. 2d 94 (D.D.C. 2003) (action by survivors of airline bombing victims against Libyan officials who "conspired and succeeded in destroying a civilian commercial aircraft filled to capacity with innocent and unsuspecting passengers" may stand). Congress enacted

the ATA in 1992, twelve years after the Second Circuit held in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), that the ATCA provides aliens with a cause of action to sue for a violation of U.S. treaties or the law of nations. By 1992, numerous federal courts had adopted this analysis. *See e.g., Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 n.5 (D.C. Cir. 1985); *Forti v. Suarez-Mason*, 762 F. Supp. 2d 1531, 1539 (N.D. Cal. 1987).

It is highly laudable that Congress has passed legislation to protect U.S. citizens against terrorism and deter this "violation of the law of nations." Br. for the U.S. at 28 n.6. Such legislation, however, provides no parallel access to U.S. courts for aliens who have been victimized, even when the terrorist attack occurs in the United States. Thus, it is only through the ATCA (which Congress was certainly aware of when it passed the ATA) that aliens may seek redress for terrorist attacks.

Should this Court reverse the nearly twenty-five years of law granting a federal forum to aliens who suffered grave human rights abuses, two classes of victims of terrorist acts will exist: those who may vindicate their rights, and those who may not. That dichotomy would be patently unfair and grossly unjust. Nothing can compensate the alien victims of terrorism for their loss, but this Court should permit their universal human rights to be vindicated through the only means available to them at this time.

A. The ATCA Affords Foreign Nationals Who Are Victims of Terrorism the Only Meaningful Opportunity to Vindicate Their Rights and Recover Damages.

The ATCA gives foreign nationals the only meaningful opportunity to collect for money damages against acts of terrorism in the U.S. courts. Although there is no universally recognized definition of "terrorism,"[12] *see United States v. Yousef*, 327 F.3d 56, 106-07 (2d Cir. 2003); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring), certain acts of terrorists, particularly the acts committed by Al Qaeda members on September 11th, have long been recognized by U.S. courts as violating accepted norms of customary international law. *See Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 99-100 (D.D.C. 2003).

Plaintiffs in *Burnett*, survivors of the alien victims of September 11th attacks, among others, filed suit "to hold accountable the persons and entities that funded and supported . . . al Qaeda." 274 F. Supp. 2d at 99-100. Ruling in accordance with the great majority of federal courts, the district court denied the defendants' motion to dismiss and found that the ATCA creates a cause of action. *Id.* at 99. The court also held that plaintiffs satisfied the third element of the ATCA claim, that the "tort is committed in violation of the law of nations or a treaty of the United States." *Id.* at 99-100.

Specifically, the *Burnett* court found that "the September 11 attacks began with the hijacking of four

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12. Because customary international law is ever-evolving, *see Filartiga*, 630 F.2d at 880, as nations of the world unite to combat terrorism, U.S. courts may eventually conclude that "terrorism" violates established norms of customary international law.

airplanes, and aircraft hijacking is generally recognized as a violation of international law of the type that gives rise to individual liability" under ATCA. *Id.* at 100 (citing *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447-48 (2d Cir. 2000); *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir.1996); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 (D.D.C. 2003); *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289, 309 (S.D.N.Y. 2003); *Abdullah v. Pfizer, Inc.*, No. 01CIV8118, 2002 WL 31082956, at *4 (S.D.N.Y. Sept. 17, 2002)); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism. . . ."); *United States v. Yunis*, 924 F.2d 1086, 1092 (D.C. Cir. 1991) ("Aircraft hijacking may well be one of the few crimes so clearly condemned under the law of nations that states may assert universal jurisdiction to bring offenders to justice, even when the state has no territorial connection to the hijacking and its citizens are not involved." (internal citations omitted)).

The *Burnett* court reaffirmed the principle that "[t]he ATCA may be applied to certain actions of private, non-state actors." 274 F. Supp. 2d at 100 n.9 (citing *Sanchez-Espinoza*, 770 F.2d at 206). Airline hijacking is one of a very limited number of such actions, as it is almost never committed by a state actor. The fact that the attacks of September 11th were committed by private persons is thus irrelevant to the terrorists' liability under the ATCA. *See Burnett*, 274 F. Supp. 2d at 100.

The terrorists' egregious acts on September 11th also violated other long-recognized norms of customary international law. The international community has reached a general consensus that the acts of Al Qaeda on September

11th were a crime against humanity. As Mary Robinson (the U.N. Commissioner for Human Rights at the time of the attacks) remarked: the September 11th attacks on the United States were "an attack on the rule of law, democracy and human rights," constituting "a crime against humanity." Wendy S. Ross, U.S. Dep't of State, *Sept. 11 Attacks Were Crimes Against Humanity, Says UNHCR's Robinson* (Oct. 17, 2001), *at* http://usinfo.state.gov/topical/pol/terror/01101706.htm. Benjamin Ferencz, the former U.S. Chief Prosecutor at the Nuremberg war crimes trials, condemned the attacks of September 11th as "clearly a crime against humanity . . . because it is deliberate and intentional killing of large numbers of civilians for political or other purposes." Interview by World Online with Benjamin Ferencz (Sept. 19, 2001), *at* http://www.ratical.org/ratville/CAH/cahCAH.html. *See also* Human Rights Watch, Human Rights News, *September 11: One Year On: A Message to the Human Rights Community* (Sept. 9, 2002), *at* http://www.hrw.org/press/ 2002/09/sept11.htm ("The September 11 attacks were a crime against humanity that flouted the fundamental values of international human rights and humanitarian law."); William A. Schabas, *Punishment of Non-State Actors in Non-international Armed Conflict*, 26 FORDHAM INT'L L.J. 907, 923 (2003).

Since the post-World War II Nuremberg trials of Nazi criminals, crimes against humanity have been recognized to encompass: "murder . . . or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the law of the country where perpetrated." *United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1200 (1952) (quoting Control Council Law No. 10, art. II). "[T]he ruling of the Nuremberg Tribunal memorialized the recognition of 'crimes against humanity' as customary international law." *Estate of Cabello v. Fernandez-Larios*,

157 F. Supp. 2d 1345, 1360 (S.D. Fla. 2001) (citing *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994)). As such, crimes against humanity are actionable under the ATCA. *See Kadic*, 70 F.3d at 236; *Princz*, 26 F.3d at 1182-83; *Estate of Cabello*, 157 F.Supp.2d at 1360; *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 156 (2d Cir. 2003) (citing BRIGADIER GENERAL TELFORD TAYLOR, U.S.A., CHIEF OF COUNSEL FOR WAR CRIMES, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 109 (Aug. 15, 1949) (William S. Hein & Co., Inc. 1997) ("[C]ertain 'crimes against humanity' are proscribed by customary international law in part because of '[t]he force of circumstance' and 'the grim fact of worldwide interdependence.'")).

The Rome Statute of the International Criminal Court provides that a "crime against humanity" is any of certain enumerated acts prohibited by international law, including murder and torture, "when committed as part of a *widespread or systematic* attack directed against any civilian population, with knowledge of the attack." U.N. Doc. A/CONF.183/9 (1998), art. 7 (emphasis added). Federal courts have adopted this definition. *See Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1353 (N.D. Ga. 2002) (invoking the language of the Rome Statute in a suit brought under ATCA and TVPA by Bosnian torture victims); *see also Tachione v. Mugabe*, 169 F. Supp. 2d 259, 279 n.76 (S.D.N.Y. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999). Clearly, the September 11th attacks meet this standard.

Importantly, in *Kadic*, the Second Circuit held that crimes against humanity do not require state action.[13] 70

13. Additionally, the International Criminal Tribunal for the Former Yugoslavia expressly reaffirmed the principle of individual responsibility for crimes against humanity under international law:

F.3d at 236 (following the customary international law invoked by the U.S. at Nuremberg); *see also* Control Council Law No. 10, art. II(2) (Prohibition against crimes against humanity applies to "[a]ny person, without regard to . . . the capacity in which he acted."); *In re Krupp and Others*, 15 I.L.R. 620, 626-27 (U.S. Milit. Trib. Nuremberg 1948) (private individuals liable for crimes against humanity); *In re Krauch and Others (I.G. Farben Trial)*, 15 I.L.R. 668, 678-79 (U.S. Milit. Trib. Nuremberg 1949).

B. The ATCA Is a Powerful Tool for the United States in its War Against Terrorist Organizations.

Terrorist groups such as Al Qaeda need vast resources to finance their attacks. *See* GREENBERG ET AL., *supra*, at 34. Crippling the financial networks which allow terrorist groups

> [t]he principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg is the cornerstone of international criminal law. This principle which is the enduring legacy of the Nuremberg Charter and Judgment which gives meaning to the prohibition of crimes under international law by ensuring that the individuals who commit such crimes incur responsibility and are liable to punishment.

Prosecutor v. Dusko Tadic, 36 I.L.M. 908, 947 (1997). International law does not require a crime against humanity to be both widespread *and* systematic. *Id.* at 942 (emphasis added). One of these alternatives suffices to meet the requisites of the "directed against a civilian population" prong. *Id.* The Tribunal also noted that crimes against humanity could be committed "in a systematic manner or on a large scale." *Id.* The "large scale" requirement is "sufficiently broad to cover various situations involving multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude." *Id.* at 943.

to operate is essential to preventing future attacks. The ATCA is key to this effort, as it enables alien victims of terrorist attacks to sue their attackers and anyone who financially supported the attacks. The ATCA also provides alien victims with an incentive to assist the U.S. and our allies in investigating and dismantling Al Qaeda's financial networks.

The Petitioner and the Solicitor General argue baselessly that terrorists could invoke the ATCA to sue the United States, its officials, or our nation's allies in the war on terrorism. Br. for Pet. 38-39, Br. for the U.S. at 52-53. It is a gross distortion of the law to argue that the ATCA somehow impedes the war on terrorism. First, the United States and other sovereign nations are immune from suit under the ATCA. *Sanchez-Espinoza*, 770 F.2d at 207; The Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 (2003). Second, because Congress has mandated that "a principal goal" of United States foreign policy "shall be to promote the increased observance of internationally recognized human rights by all countries," 22 U.S.C. § 2304(a)(1) (2003), it is presumed that the United States, in fighting the war on terrorism (either through its own agents and officers or those of friendly nations), will respect human rights and abide by the law of nations.[14] Third, military actions of the United States cannot be challenged in federal courts as they are non-justiciable political questions. *Eminente v. Johnson*, 361 F.2d 73 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 929 (1966). Thus, lawsuits filed by terrorists under the ATCA would quickly be disposed of by the district courts.

In the wake of the September 11th attacks, Congress undertook a broad reorganization of the government's law enforcement powers. *See* USA PATRIOT Act, Pub. L. 107-56, 115 Stat. 272 (2001). Had Congress believed that any statute, including the ATCA, could impede the war on terrorism, it would have repealed the statute in its overhaul of our laws. To the contrary, Congress has ignored recent calls by lobbyists to repeal or amend the ATCA. *See, e.g., Big Oil's Dirty Secrets*, ECONOMIST, May 10, 2003, at 53, 54; Daphne Eviatar, *Profits at Gunpoint: Unocal's Pipeline in Burma Becomes a Test Case in Corporate Liability*, NATION, June 30, 2003, at 16. By declining to repeal the ATCA, even after the September 11th attacks, Congress once again affirmed its confidence in the district courts to fairly adjudicate human right claims on a case-by-case basis pursuant to the ATCA. This Court would exceed its proper role were it to repeal a cause of action that has existed for well over 200 years to protect foreign policy concerns that Congress apparently does not share. *See Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329 (1994).[15]

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14. Congress has consistently favored candid, public scrutiny of nations' compliance with fundamental human rights to be an integral part of U.S. foreign policy. To that end, Congress has directed the State Department to comprehensively review and report annually on the status of internationally recognized human rights in virtually every nation in the world, 22 U.S.C.A. § 2151n; 19 U.S.C.A. § 2464, and on the status of religious freedom in individual countries. 22 U.S.C.A. § 6412. Congress has also denied funding to countries that commit a consistent pattern of gross violations of internationally recognized human rights. 22 USCA § 2151n, 22 U.S.C. § 2304. In the 2002 State Department Reports, the United States comprehensively evaluated foreign nations' policies on terrorism. Thus, it is disingenuous to claim, as Petitioner does (Brief for Pet. at 34-43), that

permitting suits by alien victims of terrorist attacks would impede executive foreign policy. *See Doe v. Unocal Corp.*, 963 F. Supp. 880, 893 (C.D. Cal. 1997) (when "the coordinate branches of government have already denounced the foreign state's human rights abuses, it is hard to imagine how judicial consideration of the matter will . . . substantially exacerbate relations. . . .").

15. In *Barclay's Bank*, this Court disavowed any competence to determine whether a state law interfered with U.S. foreign relations or whether conversely Congress had decided to allow the state to act. 512 U.S. at 324-31. Noting that "[t]he judiciary is not vested with the power" to decide how

The act of state and political question doctrines permit courts, on a case-by-case basis, to dismiss specific claims where adjudication would exceed the judiciary's proper role. Petitioner's suggestion that this Court should preclude all ATCA claims based on alleged foreign policy effects, Br. for Pet. at 34-43, however, conflicts with this Court's well-established separation of powers principles. Courts ordinarily have the obligation to decide a properly presented case, even where the controversy may potentially implicate foreign affairs. *See W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 409-10 (1990). Courts cannot "shirk this responsibility merely because [a] decision may have significant political overtones," *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1985), or because it may embarrass foreign governments. *W.S. Kirkpatrick & Co.*, 493 U.S. at 409-10. This Court has never declared that the mere possibility certain cases will impact foreign affairs grants it the authority to wholly foreclose a cause of action created by Congress. Not surprisingly then, courts have unanimously rejected the argument Petitioner and his *amici* make now: that ATCA claims are inherently non-justiciable. *See, e.g., Alvarez-Machain v. United States*, 331 F.3d 604, 614 (9th Cir. 2003); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996).[16]

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to balance the competing concerns involved, *id.* at 328, the Court presumed that Congress' inaction evinced "a willingness to tolerate" a state law that had engendered considerable diplomatic protest from other nations. *Id.* at 324 n.22, 327. If Congressional inaction implies tolerance of state intrusion into foreign relations, surely Congressional inaction demonstrates toleration of purported foreign policy effects of a statute Congress itself enacted. *Id.* at 328.

16. As existing justiciability doctrines clearly do not permit the wholesale evisceration Petitioner and his supporting *amici* seek, Petitioner claims that the "same concerns" underlying the act of state doctrine counsel in favor of

A blanket preclusion of the claims of deserving plaintiffs would have a profound impact on the war on terrorism. Repeal of the ATCA would mean that aliens injured by terrorists attack within the U.S. could not sue the terrorists in our courts. It would also mean that alien victims of terrorists acts that occur abroad could not sue terrorists who are present on our shores. It would be disingenuous of our government to close its courts to foreign nationals harmed by terrorists at a time when the United States seeks global cooperation to fight terrorism. This is especially so, as the U.S. expressly claims the right to prosecute terrorists who use bombs in the U.S., even if the victim is an alien. 18 U.S.C. § 2332f(b)(1)(F).

Just as the government has the right to pursue and punish those involved in terrorist acts in the U.S. against alien victims, the victims themselves should have civil remedies in U.S. courts. Disparate treatment of alien victims of terrorist attacks trivializes the alien victims' suffering and signals that they do not deserve justice. Alarmingly, it gives the impression that the United States is committed to ending terrorism only within our borders, and not throughout the world. Such an impression severely compromises the U.S.'s moral stature in its efforts to fight terrorism. It simply cannot be perceived by our allies that we are unconcerned with protecting their nationals.

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that result. Br. for Pet. at 37. This Court, however, has rejected the notion that "the underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine (or, as the United States puts it, unspecified 'related principles of abstention') into new and uncharted fields." *W.S. Kirkpatrick*, 493 U.S. at 409.

C. Congress Has Repeatedly Sanctioned the Courts' Interpretation that the ATCA Creates a Cause of Action.

The First Congress passed the ATCA as part of section 9 of the Judiciary Act of 1789, which established the court system of our fledgling nation and created federal jurisdiction over issues of national importance, including suits brought by aliens.[17] *See Randall, supra*, at 12; David Cole et al., *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in Trajano v. Marcos*, 12 HASTINGS INT'L & COMP. L. REV. 1, 14 (1988). The ATCA was intended to help secure the credibility of our nation within the international community at a time when the United States was young and weak. "Respect for international law was seen by the founding and early generations of the Republic as being an essential ingredient in the legitimacy of the nation." David J. Bederman, *National Security: Globalization, International Law and United States Foreign Policy*, 50 EMORY L.J. 717, 719 (2001).

Courts and legal scholars have gleaned the purpose for the passage of the ATCA from the concerns and beliefs of our leaders at the time it became law. *See Tel-Oren*, 726 F.2d at 782-84 (Edwards, J., concurring); *Filartiga*, 630 F.2d at 887-88; *see generally* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83

17. Our early leaders' desire to uphold the law of nations is also reflected in the debates at the Constitutional Convention. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 12 (1985). John Jay declared that "committing such questions to the jurisdiction and judgment of the courts appointed by and responsible only to one national government cannot be too much commended." THE FEDERALIST No. 3, at 43 (John Jay) (Clinton Rosseter ed., 1961).

AM. J. INT'L L. 461 (1989); Anthony D'Amato, Comment, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988). The Founding Generation knew there were consequences for failing to offer adequate judicial remedies to aliens injured by violations of international law. *See, e.g.*, Burley, *supra*, at 487; Randall, *supra*, at 12. By granting aliens access to a functioning court system, the Founders demonstrated to the international community that the United States would protect the interests of citizens of other nations in a fair manner. The Founders also ensured that "individuals who flouted international law would find no quarter in the United States." Burley, *supra*, at 487. These concerns are as valid today as they were in 1789.

Ignoring this legislative history, the Solicitor General curiously claims that the ATCA was only meant to apply to acts within the territory of the United States. Br. for the U.S. at 55. Even assuming *arguendo* that such a reading of the ATCA were correct (which it is not), this would not preclude alien victims of terrorist attacks from seeking redress when attacks take place in the United States. Yet the Solicitor General asks this Court to deny even this opportunity for alien victims and their survivors to recover for their loss.

The Solicitor General further argues that, at best, the district courts can hear disputes arising from matters on the high seas. *See* Br. for the U.S. at 34. It impliedly asks this Court to find that the ATCA only applies to international law as of 1789. This simply does not follow. The ATCA's language is not aimed at violations of international customary law or treaties of the United States regarding acts upon the high seas; or treaties involving technology of the 18th Century. By its plain meaning, the Alien Tort Claims Act contemplates *any* "violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The statute's language clearly contemplated that courts would apply international law as it evolved. The Hague Convention of

1970 (codifying the international condemnation of aircraft hijacking) is as equally binding on the United States as was the Treaty of Paris of 1800, 7 Bevans 801 (expired July 31, 1809) (an agreement between the U.S. and the Empire of France to keep pirates out of their respective ports and punish any citizens who gave pirates aid). *See* U.S. CONST. art. VI, cl. 2 (treaties are "the supreme Law of the Land"). The nature of international law is that it must be examined "not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Filartiga*, 630 F.2d at 881 (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 1 L. Ed. 568 (1796) (distinguishing between 'ancient' and 'modern' law of nations)). Every court that has considered the question has so held.

Congress reaffirmed the ATCA's continued viability when in 1991 it passed the Torture Victims Protection Act, which it modeled after the ATCA. Congress noted that the ATCA "has other important uses that should not be replaced," and that it "should remain intact to permit suits based on other norms that already exist or may ripen in the future." H.R. Rep. 102-367(I), at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86. The Solicitor General misleadingly remarks that Congress twice chose not to alter the ATCA's language, citing only to Congress's consideration of the statute in 1911 and 1948. Br. for the U.S. at 18-19. The Solicitor General fails to discuss that Congress also reaffirmed the ATCA in 1991. The members of Congress in 1991 acted in accord with the wishes of the members of Congress of 1789, 1911, and 1948, recognizing that the inexorable march of time permits courts to apply evolving norms of international law in an ever-changing world.

CONCLUSION

Our nation is engaged in a global war on terrorism. Congress enacted the ATCA so that foreign nationals would have the authority to seek redress for violations of the law of nations, which the attacks of September 11th most certainly were. The efforts to defeat groups like Al Qaeda, and to shatter their support networks, will not succeed with half-hearted efforts to find them and seize their assets. The Solicitor General, by asking this Court to unjustly deny alien victims of terrorist attacks the right to a civil remedy, undermines the very goals he purports to protect. The ATCA is an effective weapon for pursuing those responsible for the attacks of September 11th and holding them responsible for their murderous actions. Thus, this Court should not judicially repeal the ATCA, nor should it overrule the twenty-five years of case law that holds the ATCA creates a cause of action.

Respectfully submitted,

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February 27, 2004

Appendix A

List and Descriptions of Amici Curiae

List of Amici Curiae

Barry Amundsen	(brother of Craig Amundsen)
Kimi Beaven	(wife of Alan Beaven)
Kelly Campell	(sister-in-law of Craig Amundsen)
Charles Greene	(brother of Donald Greene)
Douglas F. Greene	(brother of Donald Greene)
Regan Grice-Vega	(wife of Peter Vega)
John Leinung	(father of Paul Battaglia)
Elaine Leinung	(mother of Paul Battaglia)
Alissa Rosenberg-Torres	(wife of Luis Torres)
Paula Shapiro	(mother of Eric Eisenberg)
Jack Shapiro	(grandfather of Eric Eisenberg)
Dorothy Shapiro	(grandmother of Eric Eisenberg)

Descriptions of Victims

Craig Amundsen worked as a computer graphics illustrator for the Army's deputy chief of staff for personnel command at the Pentagon. A husband and father of two children, Mr. Amundsen, age 28, is also survived by family and friends in Missouri and Iowa, where he was raised.

Paul Battaglia started off as an intern during high school with Marsh & McLennan, which he parlayed into a full-time position as risk consultant upon graduation from SUNY Binghamton. He was 22 years old when he died.

Alan Beaven, age 48, was killed on flight 93 in Pennsylvania while trying, with other passengers, to take control of that flight after it was hijacked. A citizen of New Zealand, Alan Beaven was an accomplished environmental lawyer who specialized in clean-water cases. Before his death, Mr. Beaven was about to try one last case before taking a year-long sabbatical. Mr. Beaven had three children.

Eric Eisenberg, employed by Aon, was 32 years old when he died. He was an expert computer technician. His mother, who spoke with him after the first plane hit the tower, believes he stayed behind to help evacuate other people.

Donald Greene died on Flight #93, which crashed in Pennsylvania. The CEO and first vice president of Safe-Flight, an aviation company based in New York, Mr. Greene was a licensed pilot. He was the father of two children.

Luis Torres was, briefly, a paratrooper in the Columbian military. A native of Colombia, he came to the U.S. via Mexico in the late 1980's. He started a new job as a senior currency broker at Cantor Fitzgerald on September 10, 2001.

Peter Vega was a firefighter with Ladder Company 118 in Brooklyn. A husband and father, Mr. Vega, age 36, was married for five years before his death. He was a veteran of the U.S. Air Force.

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No. 03-339

FEB 27 2004

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PRESBYTERIAN CHURCH OF SUDAN AND CLIFTON KIRKPATRICK AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE[1]

The Presbyterian Church of the Sudan ("PCOS") is an unincorporated association of more than 35,000 members of the Presbyterian faith. The PCOS came into existence in 1902 through the work of missionaries of the Presbyterian Church (U.S.A.) in Sudan's Upper Nile Province. The PCOS is divided into congregations or parishes, all subject to the Presbytery, which is a ruling body that consists of a representative from each congregation. The PCOS is a member of the World Council of Churches, World Alliance of Reformed Churches, Sudan Council of Churches, and the All-Africa Council of Churches.

The PCOS is a plaintiff in a putative class action brought under 28 U.S.C. § 1350, the Alien Tort Claims Act ("ATCA") against Talisman Energy, Inc., a Canadian oil company doing business in the United States directly or through a wholly owned-subsidiary. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289 (S.D.N.Y. 2003).[2] There, plaintiffs allege that Talisman, together with the fundamentalist Islamic government of Sudan, one of seven states declared to be state sponsors of terrorism by the U.S. State Department[3], collaborated to commit gross violations of customary international law including, genocide, war crimes, extrajudicial murder, forcible

1. No counsel for any party authored this brief either in whole or in part, and no person other than *amici curiae*, their counsel and their members made any monetary contribution to its preparation or submission. Supreme Court Rule 37 (6). The written consents of the parties to the filing of this brief have been filed with the Clerk.

2. In that case, plaintiffs also bring a claim against the Republic of Sudan under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq*.

3. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706.

displacement, torture, and other crimes against humanity as part of a security strategy to create a *cordon sanitaire* around the oil concessions in southern Sudan. Churches, congregations and ministers are alleged to be particular targets of these criminal acts.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. It is organized through an ascending series of organizations known as church sessions, presbyteries, synods, and, ultimately, a general assembly. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. Since 1833, PC (U.S.A.) has been in mission service around the world. Missionaries of the PC (U.S.A.) founded the Presbyterian Church of Sudan and other Presbyterian churches around the world. This brief is consistent with the policies adopted by the General Assembly regarding religious freedom, human rights, and due process. It is also consistent with the General Assembly intent to support its sister denominations around the world.[4]

Non-U.S. victims of piracy, genocide, war crimes, extrajudicial murder, torture and other violations of customary international law have sought redress in U.S. federal courts for more than 200 years. The lower courts have

4. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

recognized that in the typical ATCA case it is difficult for victims to receive a fair or impartial hearing in the state which has perpetrated or sanctioned such abuses.[5] Accordingly, the continued vitality of the ATCA to provide due process and a level playing field to all parties in disputes alleging violations of specific, universal and obligatory norms of international law is of vital interest to *amici*. Otherwise, victims of the most virulent abuses of customary international law, which are often manifest in the form of widespread and systematic religious persecution, e.g., the Holocaust, would be left with no recourse.

SUMMARY OF ARGUMENT

Petitioner's *sui generis* argument is unsupported by any judicial authority construing 28 U.S.C. §1350, and in an area of paramount concern to *amici* extends far beyond challenging the specific decision in this case. The legal arguments and precedents supporting the use of the ATCA as both a jurisdictional statute and as providing a substantive cause of action are overwhelming. Enacted in 1789 as part of the First Judiciary Act, the Alien Tort Claims Act provides: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[6] Since 1795, the Attorney General of the United States has recognized that this grant of common law jurisdiction was sufficient to vest federal courts with the power to hear tort claims brought by non-U.S. persons, when the tort was

5. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

6. Act to Establish the Judicial Courts of the United States, ch. 20, 39, 1 Stat. 73, 76-77 (1789)(the "First Judiciary Act").

committed in violation of the law of nations, or customary international law.[7]

Since its enactment the ATCA has been construed and applied by the courts in conformity with traditional American legal principles and United States foreign policy interests. Indeed, cases which go beyond the narrow confines of customary international law or which impermissibly intrude on American foreign policy have been routinely dismissed. Contrary to the position taken by Petitioner and supporting amici litigation under the ATCA is rare and lower courts have interpreted the statute in a manner consistent with its language and intent.

Universal religious freedom is the principal touchstone of American pluralism.[8] The United States Constitution

7. In 1795 the U.S. Attorney General was asked to consider the potential liability of U.S. citizens who had aided the French in attacking the British colony in Sierra Leone. The opinion, only six years removed from the adoption of the First Judiciary Act, reveals that the First Congress understood that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be:

> . . . there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.

1 *Op. Att'y Gen.* 57, 59 (1795) (emphasis in original). *See also* 26 *Op. Att'y Gen.* 250, 253, (1907) ("I repeat that the statutes thus provide a forum and a right of action.") We respectfully refer the Court to Respondents' brief which contains substantial lower court authority which we do not repeat here, in deference to the rules of the Court.

8. Our nations's founders fled from religious persecution in search of a land where they could freely exercise (Cont'd)

reserves to the individual the right to practice his or her religion freely and religious tolerance is a key value in the American social matrix. The suggestion by Petitioner, that U.S. law should be interpreted to immunize perpetrators of international religious persecution who have committed genocide, war crimes, torture and slavery is a grave affront to civilized notions of the rule of law in the United States, contrary to the intent of Congress and inconsistent with the foreign policy of the United States.

Promoting and protecting international religious freedom is a key aspect of U.S. foreign policy. The United States Department of State publishes an Annual Report on International Religious Freedom which is compiled through the office of the U.S. Ambassador-at-Large for Religious Freedom. According to Secretary of State Colin Powell, the purpose of the 2002 report was to "serve as a basis for discussions with other nations on how best we can work

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> their ideal of religious freedom. They stood recognizing that the supression of their faith was tyranny over their hearts and minds. They knew that without the freedom to gather, to worship, to speak about their God, there would be no freedom. So they laid the cornerstone for our democracy, establishing freedom in law. And from that day, the protection of religious freedom has become part of our legacy, part of our identity as a nation.

144 CONG. REC. S12095 (daily ed. Oct. 9, 1998) (statement of Sen. Hutchinson) International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401 (1998). The Act created the United States Commission on International Religious Freedom, an Ambassador at Large for International Religious Freedom in the State Department, and a Special Adviser on International Religious Freedom for the National Security Council.

together to end violations of this fundamental human right and how to advance religious liberty around the globe."[9]

The U.S. State Department's "International Religious Freedom Report" dated December 18, 2003 highlights the importance of international religious freedom in U.S. foreign policy:

> Americans have long cherished their own religious freedom. More recently, they have also come to cherish their government's advocacy for those millions around the world who suffer persecution for their religious beliefs. President Bush has time and again affirmed the signature priority that advancing religious liberty holds for our nation. From his National Security Strategy's declaration that "We will... take special efforts to promote freedom of religion and conscience and defend it from encroachment by repressive governments" to his conviction that "successful societies guarantee religious liberty– the right to serve and honor God without fear of persecution," he has made clear that religious freedom holds an integral place in American foreign policy.

U.S. Department of State, International Religious Freedom Report, p. 1.[10]

Congress has joined the Executive branch in recognizing America's interest in international religious freedom. In 1998 Congress established the United States Commission on International Religious Freedom ("USCIRF") to monitor and

9. United States Commission for International Religious Freedom, 2003 Report, at 57, available at *http://www.uscirf.gov/reports/02May03/finalReport.php3* (last visited Feb. 25, 2004).

10. Available at *http://www.state.gov/g/drl/rls/irf/2003* (last visited Feb. 18, 2004).

promote religious freedom abroad: "Religious freedom is a fundamental right of every individual, regardless of race, sex, country, creed, or nationality and should never be arbitrarily abridged by any government."[11] In the words of the Commission "By providing reliable information, analysis, and careful and creative policy recommendations, the Commission gives the U.S. government and the American public the tools necessary to promote religious freedom throughout the world."[12]

From our unique perspective as religious organizations with world-wide interests, *amici* believes that the ATCA provides a much needed legal response to the rising tide of violent religious persecution in the world today. Most ATCA plaintiffs are citizens of countries ruled by violent, repressive dictatorships with no constitutional guarantees of due process

11. International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401 (1998). The legislative history of the International Religious Freedom Act evinces Congress' intention to make the safeguarding of international religious freedom a cornerstone of U.S. foreign policy. "Passage of the pending legislation will signal to the world that the Congress stands fully behind all efforts to promote religious freedom along with other fundamental human rights as a core component in the United States foreign policy agenda." 144 CONG. REC. S12093 (daily ed. Oct. 9, 1998) (statement of Sen. Dodd);

> Mr. President, the International Religious Freedom Act of 1998 represents a vitally important piece of legislation to raise awareness of and combat religious persecution overseas. Some would downplay the problem of religious persecution abroad, but preserving religious freedom at home and promoting it in other countries is central to the purpose and objectives of the United States.

144 CONG. REC. S12093 (daily ed. Oct. 9, 1998) (Statement of Sen. Ashcroft).

12. United States Commission for International Religious Freedom, 2003 Report, at 1, available at *http://www.uscirf.gov/reports/02May03/finalReport.php3* (last visited Feb. 25, 2004).

and no independent judiciary. The federal courts are the only viable forum these plaintiffs have to redress their claims. *Amici* do not believe this is the time for the Court to sanction complicity with violent, repressive dictatorships by rolling back legislative safeguards that punish and deter universally condemned acts of international religious persecution.

The ATCA provides an impartial mechanism under which victims of certain human rights abuses may seek meaningful compensation from culpable private actors. The ATCA reinforces America's fundamental foreign policy goal of advancing international religious freedom by: 1) providing a federal judicial forum for redressing violations of customary international law that often accompany religious persecution, 2) denying sanctuary to *hostis humani generis*, perpetrators of genocide, war crimes, extrajudicial murder, slavery, torture and other crimes against humanity, and 3) deterring those who would act in violation of customary international law. Respectfully, *amici* urge that the decision below be affirmed.

ARGUMENT

I. *The ATCA Applies to Narrow and Discrete Categories of Claims Which Are Specific, Universal and Obligatory.*

The ATCA, as interpreted by the lower courts, authorizes only a very narrow category of claims in its invocation of "the law of nations," principally genocide, war crimes, extrajudicial murder, slavery, torture and other crimes against humanity. The universal condemnation of these offenses in treaties and other international agreements elevates them to the highest level of sanctionable conduct. These limited offenses violate "well-established, universally recognized norms of international law," *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996), and are cognizable under the ATCA. As the courts have

recognized, these acts "are qualitatively different from other types of violations of international law . . . [since they] constitute behavior manifestly in violation of the most basic rules of international law and, indeed, of civilized conduct." 244 F. Supp.2d at 306.[13]

International religious persecution and religious discrimination have been condemned by the community of nations at least since the early days of the twentieth century[14] and recent U.S. foreign policy statements recognize religious freedom as a fundamental, universally recognized, human right.[15] Amici strongly support the use of the ATCA as a

13. Accord: *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied,* 513 U.S. 1126 (1995) ("*Marcos II*") (violations cognizable under ATCA limited to violations of international norms which are "specific, universal and obligatory").

14. In the aftermath of World War I and the creation of many new boundaries in Europe, the community of nations entered into various treaties enshrining minority rights (both ethnic and religious) as part of customary international law. *See, e.g.*, Treaty Between the Allied and Associated Powers and Poland (Protection of Minorities), reprinted in 1 *International Legislation* (Washington: Carnegie Endowment for International Peace, 1931) at 283-299.

15. The State Department recently recognized religious freedom as a right protected by customary international law:

> Though it is a priority of the United States, religious freedom is by no means our exclusive preserve. The past century in particular has seen a growing recognition by the international community of the universal nature of religious freedom and other fundamental human rights. This awareness has come at no small cost, borne as it was out of the hard lessons wrought by destructive ideologies, colonialism, and world war. Distilled from such suffering came a new appreciation for a common human nature that transcends cultural, racial, religious and other distinctions. *This was exemplified in the 1948*

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means to seek remedies in the courts consistent with United States foreign policy initiatives condemning violent religious persecution. This has not opened, and will not open, a flood gate of litigation in the U.S. in every instance where religious intolerance exists because the ATCA only provides remedies for violation of a narrow class of specific, universal and obligatory norms of international law, e.g., genocide, war crimes, extrajudicial murder, slavery, torture and other crimes against humanity. *Kadic*, 70 F.3d at 239; *Marcos II*, 25 F.3d at 1475.

The United States Commission on International Religious Freedom is an independent agency established to monitor religious freedom in other countries and to advise the President, the Secretary of State and Congress on how best to promote and protect religious freedom.[16]

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> *Universal Declaration of Human Rights and reaffirmed in the International Covenant on Civil and Political Rights and other seminal treaties. These and other agreements make clear the overwhelming consensus of the world's nations that religious freedom is endowed in all persons and should be enjoyed by all.* This common agreement among the nations forms an effective basis for common action. The United States remains committed to advancing religious freedom by working with like-minded nations around the world. Though differences may persist on other issues in the international arena, protecting the freedom to believe and worship provides a meaningful cause for which we can work together. We have many partners in this cause and will continue to work diligently to find many more.

U.S. Dep. of State, *International Religious Freedom Report*, 2003, at 1-2, available at *http://www.state.gov/g/drl/rls/irf/2003* (last visited Feb. 18, 2004) (emphasis added).

16. International Religious Freedom Act of 1998, 22 U.S.C. § 6401 (1998). Before the passage of this law, the State Department

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The USCIRF's activities have, in part, played a role in documenting violations of customary international law and formulating United States policy responses.

Among other activities, the USCIRF visits foreign countries to assess the status of religious persecution and takes testimony from alleged victims. Where the Commission concludes that a country has engaged in or tolerated particularly severe violent abuses of religious freedom that has risen to the level of being "systemic, ongoing and egregious," the Commission may apply the designation of a "countries of particular concern." *See* 22 U.S.C. § 6442(b)(1)(A).

Sudan provides a particularly compelling example of a country designated as being "of particular concern." In 2000, the USCIRF cited Sudan for its systematic use of violence against the non-Muslim southern areas of the country. In 2002, the Commission concluded that:

> the government of Sudan [is] the world's most violent abuser of the right to freedom of religion and belief. The Commission also found that religion is a major factor in Sudan's ongoing civil war, and that religious persecution by the Khartoum regime is intertwined with other human rights and humanitarian violations in Sudan, including aerial bombardment of civilians and of humanitarian facilities, deliberate denial of international humanitarian assistance, abduction of women and children into conditions of slavery,

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would regularly include information on religious persecution in its country-by-country human rights reports. The 2002 and 2003 USCIRF Annual Reports and country-specific reports are available at *www.uscirf.gov*. (last visited Feb. 25, 2004).

and the forcible displacement of populations from oil-producing areas.

USCIRF, 2002 Annual Report on Sudan, at 1.[17]

It was these types of systematic, egregious violations that led *amicus* Presbyterian Church of Sudan to bring its action under the ATCA. *See*, 244 F.Supp. 2d. at 289. And it is these types of systematic violations that make the ATCA an appropriate and necessary statute.

The instant case involves a violation of the prohibition against arbitrary arrest and detention which the Ninth Circuit concluded had achieved the status of a "clear and universally recognized norm." *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003). The court reached its conclusion since "[t]his prohibition is codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions." *Id.*

Petitioner's argument goes beyond challenging the specific decision in this case with respect to the prohibition against arbitrary arrest and detention and constitutes a frontal assault on the use of the ATCA to provide a cause of action for any claim by an alien for violation of the law of nations. Such a result, *amici* believes, would signal a retreat from the rule of law and abandonment of Congress' 200 year-old commitment to deny sanctuary to *hostis humani generis*. Indeed, Petitioner seeks to repeal a statute which hundreds of thousands of victims of genocide, war crimes, extrajudicial murder, slavery, torture and other crimes against humanity are depending upon as their last, best hope for justice.

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17. The Sudan Peace Act, 50 U.S.C. § 1701 note, condemns Sudan as a terrorist state and includes findings that Sudan has engaged in violations of basic human rights, including genocide.

II. *The Courts Typically Construe the ATCA Narrowly and Limit its Application to Universally Recognized Violations of International Law.*

In 1789, Congress gave federal courts a central role in providing remedies for torts in violation of customary international law. The First Congress prepared the way for the United States entry into the community of nations by acceding to postulates of customary international law and barring perpetrators from ever taking sanctuary here. In its wisdom, Congress chose to express that sentiment in the broadest possible terms, referring generally to the "law of nations" as it may evolve, rather than specific offenses against that law as it then existed, such as piracy. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, *supra*. In this regard, the ATCA can be viewed as an international counterpart to the Eighth Amendment, which broadly prohibited the imposition of "cruel and unusual punishment," rather than enumerate the specific punishments the framers viewed as unconscionable. Just as the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), the ATCA does the same with respect to new benchmarks in customary international law.

An examination of the scope of the violations alleged in ATCA cases provides ample illustration of this point.

a. ATCA provided the primary basis for cases against private German and Austrian entities for slave labor and forced labor claims arising from the Holocaust. These cases were resolved for the benefit of millions of survivors who had never received one penny of compensation from the corporations that collaborated with and benefitted from Nazi racial policies. According to then Deputy Secretary of the Treasury, Stuart Eizenstat, the class action cases filed against

German companies by Holocaust survivors under the ATCA were principally responsible for launching the international negotiations that ultimately resulted in the establishment of a German Foundation to collect funds from culpable private companies for disbursement to victims of Nazi era violations of international law.[18]

Although the Holocaust-related cases were ultimately resolved by settlement, one such case analyzed the applicability of the ATCA. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J.1999). There, the court rejected the same argument made by Petitioner herein that the ATCA provided only jurisdiction but not a cause of action for plaintiff's claim of slavery in violation of the law of nations. Rather, the court chose to follow the "majority" view that the ATCA "provides both subject matter jurisdiction and a cause of action for claims alleging violations of customary international law." *Id.* at 441. To a significant extent, the court relied on the enactment of the *Torture Victim Protection Act*, 106 Stat. 73, codified at 28 U.S.C. § 1350 (note), and the related legislative history which demonstrated an endorsement of existing case law which found the ATCA to

18. We must be frank. It was the American lawyers, through the lawsuits they brought in U.S. courts, who placed the long-forgotten wrongs by German companies during the Nazi era on the international agenda. It was their research and their work which highlighted these old injustices and forced us to confront them. Without question, we would not be here without them . . . For this dedication and commitment to the victims, we should always be grateful to these lawyers."

Remarks of Stuart E. Eizenstat, Deputy Secretary of the Treasury, on July 17, 2000, at the signing of the international agreements establishing the German Foundation "Remembrance, Responsibility and Future."

supply both jurisdictional and a substantive cause of action for claims asserting violations of customary international law.

> This Court concludes that if Congress had disagreed with the courts' finding of a private right of action under the ATCA, Congress could have, and likely would have, amended the ATCA to reflect its intent. Further, the "committed in violation" language of the [ATCA] suggests that Congress did not intend to require an alien plaintiff to invoke a separate enabling statute as a precondition to relief under the [ATCA].

67 F. Supp.2d at 443, citing *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir.), *cert. denied*, 519 U.S. 830 (1996).

b. The ATCA provided the primary basis for litigation against former Philippine dictator Ferdinand Marcos by persons who had been tortured and killed by his repressive military regime. *See Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert denied*, 513 U.S. 1126 (1995). This litigation resulted in a default judgment against the Marcos Estate. Without ATCA this result could not have been achieved.

c. The ATCA provides the primary basis for litigation against Royal Dutch Petroleum Co. and Shell Transport and Trading p.l.c., for their alleged involvement in the torture and summary execution of Nigerian author Ken Saro-Wiwa. *Wiwa, supra*.

d. The ATCA currently provides the basis for litigation against Talisman Energy, Inc., for its alleged involvement in war crimes and genocidal acts against hundreds of thousands of Christian and other non-Muslim civilians in southern Sudan who have been forcibly displaced, killed or maimed

by a systematic pattern of helicopter gunship attacks, high altitude bombings and infantry attacks intended to clear civilians from the oil concessions in southern Sudan. These victims' only offense were their religious or ethnic backgrounds, and the fact that their tribal homelands were located in or around commercial oil concessions containing hundreds of millions of barrels of oil reserves. *Presbyterian Church of Sudan, supra*. As the court there noted:

> These types of acts alleged in the Amended Complaint are qualitatively different from other types of violations of international law. The Amended Complaint is rife with accusations [against defendants] which, if proven true, would constitute behavior manifestly in violation of the most basic rules of international law and, indeed, of civilized conduct. Such acts violate peremptory norms, or *jus cogens*. . . . Violations of *jus cogens* norms constitute violations of obligations owed to all.

Id. at 306 (citations omitted).

The court also noted that Talisman's commercial profit motive was not sufficient to shield it from liability under international law:

> . . . Talisman claims that it could not have committed war crimes because the Amended Complaint alleges that the acts it committed were "directed specifically at furthering its oil operations." . . . However, the fact that the desired end of Talisman's acts was the extraction of oil is irrelevant if it employed means that violated the law of nations. Plaintiffs, while noting that Talisman's primary interest was in oil extraction,

not in "ethnic cleansing" allege that Talisman willingly worked with Sudan to commit acts of "ethnic cleansing" as a means of securing the oil supply:

> Defendants have collaborated in a joint strategy to deploy military forces in a brutal ethnic cleansing campaign against a civilian population based on their ethnicity and/or religion for the purpose of enhancing Defendants' ability to explore and extract oil from areas of southern Sudan by creating a *cordon sanitaire* surrounding the oil concessions located there . . .

The fact that the allegedly unlawful acts also generated oil revenue does not mean they were not war crimes.

244 F. Supp.2d at 326-327 (citations omitted).

Petitioner and supporting amici complain that the lower court's well settled interpretation of the ATCA may result in the filing of frivolous cases. The blanket immunity from suit that the Petitioner and supporting amici suggest as a remedy would unnecessarily extinguish the legitimate claims of hundreds of thousands of victims of genocide, war crimes, and other crimes against humanity. Petitioner has made no showing to justify such a draconian result. The well established federal procedural rules that protect the courthouse from frivolous litigation in anti-trust, securities and other complex civil cases, are more reasonable safeguards particularly where, as here, victims with valid claims have no alternative forum.[19]

19. F.R.C.P. 11

In addition, daunting procedural and substantive hurdles constitute formidable deterrents to bringing ATCA cases with little or no merit. ATCA actions have been dismissed on the basis of statute of limitations[20], forum non conveniens[21], sovereign immunity[22], political question[23], and state

20. *Deutsch v. Turner Corp.*, 324 F.3d 692, 717 (9th Cir.), *cert. denied*, 124 S.Ct. 105 (2003) (Statute of limitations under the ATCA is 10 years, as limitations period was adopted from analogous Torture Victim Protection Act (TVPA), 28 U.S.C.A. § 1350 note). Plaintiffs brought actions against German and Japanese corporations, alleging that plaintiffs were forced to work as slave laborers during the Second World War and seeking damages and other remedies for lost wages and other atrocious injuries suffered. Court found that plaintiffs brought their claims far too late.

21. *Flores v. Southern Peru Copper Corp.*, 253 F. Supp.2d 510, 544 (S.D.N.Y. 2002), *affirmed*, 343 F.3d 140 (2d Cir. 2003) (court stated in dicta that it would have dismissed ATCA action on grounds of forum non conveniens but held that it did not have jurisdiction in the first instance). Peru residents brought personal injury claims against American company, alleging that environmental pollution from company's Peru mining operations caused their asthma and lung disease, and asserting federal jurisdiction under ATCA. Court held, inter alia, that Peru was adequate alternate forum.

22. *In Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989), the Supreme Court dismissed the plaintiffs' claims on sovereign immunity grounds, holding that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, bars most suits against foreign sovereigns, including those brought under the ATCA. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 152 (2nd Cir. 2003).

23. While the policy interests articulated in the Statement of Interest do not in and of themselves provide an independent legal basis for dismissal, the long-standing foreign policy commitment to resolving claims arising out of World War II and the Holocaust at a governmental level does provide such a basis.

(Cont'd)

action.[24] In addition, the requirement of establishing personal jurisdiction limits the universe of potential ATCA defendants to perpetrators found within the United States and vanquishes the notion that the ATCA constitutes an untoward exercise of extraterritorial jurisdiction.[25] While our country has traditionally served as a refuge for victims of human rights abuses, it has been the explicit policy of Congress since 1789 that we provide no sanctuary for violators.

Moreover, ATCA allegations are limited to the narrow set of claims that fit within the statutory category of a tort in violation of "the law of nations." Courts have been capable of distinguishing those few instances that fit this narrow

(Cont'd)

If the Court were to allow this action to continue, it would run afoul of the political question doctrine as articulated in Baker.

In re Nazi Era Cases Against German Defendants Litigation, 129 F.Supp.2d 370, 382 (D. N.J. 2001) .

24. The court notes that the same separation of powers principles that inform the act of state doctrine underlie the political question doctrine. *See First Nat. City Bank v. Banco National de Cuba*, 406 U.S. 759, 785-93 (1972) (Brennan, J., dissenting) (noting that the act of state doctrine, as articulated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), is equivalent to the political question doctrine); *Trajano v. Marcos*, 1989 WL76894, *2 (9th Cir. July 10, 1989) (Unpub. Disp.) ("The act of state doctrine is the foreign relations equivalent of the political question doctrine"). *Sarei v. Rio Tinto p.l.c.*, 221 F. Supp.2d 1116, 1196 (C.D. Cal. 2002); *Burger-Fisher v. DeGussa AG*, 65 F. Supp.2d 248 (D.N.J. 1999) (allegations of complicity in Jewish slave labor during the Holocaust).

25. *See Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202 (2d Cir. 2003); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003); *World Tankers Carriers Corp. v. My Ya Mawlaya*, 99 F.3d 717 (5th Cir. 1996). F.R.C.P. 4(k)(2).

definition from those circumstances that do not. *See, e.g., Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000) (allegations of discriminatory expropriation of Jewish property in Egypt, while "reprehensible," were not actionable under the Act); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) (environmental devastation does not violate the law of nations); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) ("cultural genocide" is not actionable under ATCA); *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (First Amendment claims cannot be brought under ATCA); *Aldana v. Fresh Del Monte Produce, Inc.*, 2003 U.S. Dist. LEXIS 24343 (S.D. Fl. Dec. 12, 2003) (short term detention, psychological coercion and death threats do not constitute violations of international law).

By contrast, the decisions which have allowed the ATCA claims to proceed each involve violations of the specific, universal and obligatory rights comprising "customary international law," such as genocide and war crimes, *Presbyterian Church of Sudan, supra,* crimes against humanity, *Wiwa v. Royal Dutch Petroleum Co., supra.*, and torture, *Abebe-Jira v. Negewo, supra.*

Due to the narrow interpretation of the ATCA by the lower courts this is not an area of litigation where the flood gates have opened. For the relatively rare circumstances where ATCA claims have survived initial scrutiny federal courts provide an impartial forum with extensive due process guarantees for both victims and alleged violators of customary international law. In many cases, courts have recognized that the federal judicial forum is the only option available to the victims.

III. *Federal Courts Provide a Forum Where No Independent Judiciary Exists To Adjudicate Egregious Violations of International Law*

It is not a coincidence that most ATCA plaintiffs are citizens of countries dominated by military dictators or ruling elites who do not tolerate independent, functioning judiciaries. The ATCA has not been invoked by citizens of democratic countries such as Australia, Switzerland or the United Kingdom – who have filed an amicus brief in support of the petitioner – because their national institutions support independent judiciaries capable of fairly resolving ATCA type claims.[26] The ATCA provides a forum of last resort for the adjudication of claims of disenfranchised victims living outside the world of industrialized democracies: Sudanese victims of state sponsored genocide, *Presbyterian Church of Sudan*, 244 F. Supp.2d at 325; Phillipino victims of extradjudicial murder, *Marcos II*, 25 F.3d at 1475; and Bosnian victims of state-sponsored religious and ethnic persecution *Kadic*, 70 F.3d at 239. These victims have no viable judicial forum for the adjudication of their claims in the absence of the ATCA.[27] The Second Circuit in *Wiwa*

26. Under federal precedent ATCA cases brought by the citizens of Australia, Switzerland or the United Kingdom would have difficulty surviving a forum non conveniens motion. *See, e.g., Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

27. For example, under Islamic law in the Sudan, members of the Presbyterian Church of Sudan and other southern Sudanese victims have reduced legal rights.

> These reduced rights include a a total lack of legal personality for plaintiffs who practice traditional African religions, and diminished testimonial competence for Christians. . . . [I]t would be rather surprising if the government of Sudan conducted a war of "ethnic cleansing" against plaintiffs and at the same time granted

(Cont'd)

cogently analyzed the conundrum faced by victims of international rights violations:

> One of the difficulties that confront victims of torture under color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as 'not our business.'

Wiwa, 226 F.3d at 106.

Countries such as Australia, Switzerland, and the United Kingdom are free to choose whether to open their court systems to claims of violation of customary international law. The United States Congress made that judgment in the

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> them a fair judicial process to remedy those injuries. In addition, it would be perverse, to say the least, to require plaintiffs to bring this suit in the courts of the very nation that has allegedly been conducting genocidal activities to try to eliminate them.

Presbyterian Church of Sudan, 244 F. Supp.2d at 336.

affirmative at the founding of the nation more than 200 years ago when it enacted the ATCA and denied safe harbor to *hostis humani generis*.

This Court has the historic opportunity to affirm the well settled interpretation of the ATCA formulated in the lower courts. In so doing, this Court will serve the United States' strong interest in protecting international religious freedom, preserve the fundamental rights of individuals in civilized society and promote freedom, democracy and accountability in the international community.

CONCLUSION

For the reasons stated herein, the decision below, that the ATCA provides a basis for redress of violations of customary international law, should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

José Francisco Sosa,

Petitioner

v.

Humberto Alvarez-Machain, *et. al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* CORPORATE SOCIAL RESPONSIBILITY AMICI IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

The Alien Tort Statute (ATS), 28 U.S.C. 1350, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The questions presented are:

1. Whether the ATS creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the Untied States or, instead, is a jurisdiction-granting provision that does not establish private rights of action.

2. Whether, to the extent that the ATS is not merely jurisdictional in nature, the challenged arrest in this case is actionable under the ATS.

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Amici curiae the International Labor Rights Fund, the International Center for Corporate Accountability, Verité, Domini Social Investments, KLD Research & Analytics, Inc., Harrington Investments, Inc., Interfaith Center on Corporate Responsibility, Centre for Research on Multinational Corporations, the Commission for the Verification of Codes of Conduct, OECD Watch, Oxfam America, Rugmark Foundation, TransAfrica Forum, Jubilee South Africa, and the Development Gap, collectively referred to herein as the Corporate Social Responsibility *Amici* ("CSR *Amici*"), respectfully submit this brief in support of Respondents.[1]

INTEREST OF THE *AMICI CURIAE*

The CSR *Amici* work to develop, implement or support mechanisms to improve corporate compliance with human rights standards in the global economy. Most of these initiatives are voluntary and require that participating companies agree to be bound by a specific, substantive standard, whether it is a code of conduct or an external source of law. The CSR *Amici* have found that the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, is a vital tool in establishing minimum standards of conduct for participants in the global economy. The CSR *Amici* also have an interest in responding to assertions made in various *amici* submissions in support of Petitioner, most notably in the Brief for the National Foreign Trade Council, *et. al.*, that the ATCA is a hindrance to foreign investment. A major premise of the work of the CSR *Amici* is that socially responsible companies are rewarded in the marketplace. Thus, the CSR

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[1] Letters of consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary payment towards this brief.

Amici respectfully seek leave to file this *amici curiae* brief to assist the Court.

The International Labor Rights Fund (ILRF) is a non-profit organization that promotes corporate social responsibility through advocating for human rights standards in trade agreements, developing systems to enforce corporate codes of conduct, and utilizing the ATCA and other sources of law to represent workers who have been subject to human rights violations. ILRF was formed in 1986 by a coalition of labor leaders, human rights activists, academics and religious leaders.

The International Center for Corporate Accountability (ICCA) is a non-profit organization, whose mission is to urge multinational corporations to create voluntary standards that guide their conduct in overseas operations on issues such as working conditions, protection of human rights, and sustainable development. ICCA also creates systematic procedures by which it provides independent external monitoring to verify compliance with company codes of conduct.

Verité is a non-profit organization established in 1995 to ensure that people worldwide work under safe, fair and legal conditions. Verité conducts social audits, factory remediation, issue research, capacity building and worker education in 65 countries worldwide. Verité works at the grassroots level through a global network of local organizations.

Domini Social Investments (DSI) is an investment firm specializing exclusively in socially responsible investing. DSI manages over $1.8 billion in assets for investors who wish to integrate social and environmental criteria into their investment decisions. It also manages the Domini Social Equity Fund, the oldest and largest socially and environmentally screened index

fund in the world, as well as the Domini Social Bond Fund and the Domini Money Market Account.

KLD Research & Analytics, Inc. (KLD) is the leading provider of social research for institutional investors. KLD serves institutional clients who wish to integrate social criteria into their investment decisions. To meet the needs of social investors, KLD provides performance benchmarks, corporate accountability research, and consulting services analogous to those provided by financial research service firms.

Harrington Investments, Inc. (HII) is a registered investment advisor managing assets for investors concerned about social, as well as financial, returns. Its mission is to provide highly personalized asset management services that reflect a commitment to superior financial results consistent with positive environmental, ethical, and social change. This is accomplished by investing to achieve maximum economic and social goals using comprehensive social screening.

The Interfaith Center on Corporate Responsibility (ICCR), with its 275 members from Catholic, Jewish and Protestant religious communities, promotes corporate responsibility through its members' role as shareholders. ICCR, founded in 1971, has filed shareholder resolutions and has participated in dialogues with numerous corporations on a range of human rights, labor rights and environmental issues. ICCR members promote the development and independent monitoring of comprehensive corporate codes of conduct based on internationally-recognized human rights standards.

Centre for Research on Multinational Corporations (SOMO) is a Netherlands-based organization founded in 1973 that conducts research for non-governmental organizations and trade

unions on the behavior of transnational corporations, the trade and investment agreements in which they operate, and the implementation of codes of conduct.

The Commission for the Verification of Codes of Conduct (COVERCO) is a Guatemalan non-profit organization dedicated to providing accurate and credible information on workplace compliance with labor standards in Guatemala's major export industries for prominent U.S. companies, including The Gap, Starbucks, and Liz Claiborne.

The Organization for Economic Cooperation in Development Watch (OECD Watch) is an international network that facilitates activities around the OECD Guidelines and the work of the Committee on International Investment and Multinational Enterprises. One of its main purposes is to assist organizations that wish to bring complaints against multinational corporations for violations of human rights.

Oxfam America works to find lasting solutions to poverty, suffering and injustice. Oxfam America's campaign and communications work is aimed at mobilizing public opinion to change the rules of international trade and the policy and practices of multinational companies.

Rugmark Foundation is dedicated to ending illegal child labor in the carpet industry through a voluntary licensing program in which participating companies agree to random, surprise inspections of manufacturing sites to ensure that no child labor is used. Companies in Europe and the United States participate in Rugmark's independent monitoring program.

TransAfrica Forum is a non-profit organization dedicated to educating the general public, particularly African Americans,

on the economic, political and moral ramifications of U.S. foreign policy as it affects the African Diaspora. TransAfrica Forum sponsors seminars, conferences, community awareness projects, and training programs that promote U.S. policies that are supportive of human rights, democracy, and sustainable economic development.

Jubilee South Africa is a network of non-governmental membership based organizations concerned with global corporate social responsibility.

The Development Group for Alternative Policies (The Development GAP) is a non-governmental organization that collaborates with civil-society organizations to advance the right of citizens to participate fully in economic decision-making that affects their communities. The organization works to ensure that trade and investment agreements strike a balance between the interests of citizens and corporations.

SUMMARY OF ARGUMENT

Respondents, and several of the other *amicus curiae* briefs filed in support of Respondents, demonstrate that the interpretation of the ATCA in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and by every court that has considered the issue since then, up to and including the Ninth Circuit's *en banc* decision being reviewed in this case, is correct as a matter of law. This brief will address the argument made by several of the *amici* submissions in support of Petitioner that the ATCA is a hindrance to foreign investment by U.S. multinationals. This position is most directly advanced in the Brief for the National Foreign Trade Council, *et. al.* (hereinafter "NFTC Brief"), in which the various business organizations (hereinafter "Business *Amici*") assert that the mere existence of a right to sue for

fundamental human rights violations established by the ATCA poses a threat to their economic well-being.

As an initial matter, the economic impact issue raised by the Business *Amici* is not in the record of this case. Several pending cases in the lower courts may some day present an appropriate record for this Court to consider the economic impact of the ATCA, if indeed such an argument would ever have any legal relevance. Nonetheless, if the arguments made by the Business *Amici* in the NFTC Brief are given any consideration, the CSR *Amici* will demonstrate herein that the ATCA, as interpreted today, is simply one source in a body of law that includes the Nuremberg Tribunals, and various other federal laws, that place clear, universally recognized limits on the conduct of corporations and individuals. For the Business *Amici* to target the ATCA as the barrier to greater profits ignores substantial precedent demonstrating that the U.S. has been a leader in applying the rule of law to human rights violations. There is simply no legal basis for the Business *Amici* to assert that their desire for further profit overrides the ATCA, which applies to prevent slavery, torture, extrajudicial killing, genocide, war crimes, crimes against humanity, and arbitrary detention.[2]

The CSR *Amici* will also demonstrate that the ATCA's very limited scope poses absolutely no threat to foreign investment by U.S. companies. Virtually all of the firms represented by the Business *Amici* participate in some form of a corporate social responsibility initiative and pledge to comply with social standards that far exceed the minimum standards of

[2] *See* section III, *infra*, for a discussion of cases that demonstrate this narrow scope of the federal courts' interpretation of the "law of nations" for purposes of the ATCA.

fundamental human rights under by the ATCA. Unless these companies are misrepresenting their compliance with these standards, their assertion that the ATCA is a hindrance to their economic competitiveness is simply incredible.

ARGUMENT

I. THE ECONOMIC IMPACT ON MULTINATIONAL CORPORATIONS OF HUMAN RIGHTS STANDARDS UNDER THE ATCA IS NOT BEFORE THE COURT.

The Business *Amici* are asking this Court to consider their argument that the ATCA puts them at a competitive disadvantage in the global economy. *See, e.g.*, NFTC Brief at 10-13. The record in this case does not include any competitive disadvantage or other economic impact issues on multinational corporations, making this case an inappropriate vehicle for considering this argument. A fundamental principle of Supreme Court practice is that the Court will not consider issues that are not squarely before it. For example, in *California v. San Pablo & T. R. Co.*, 149 U. S. 308, 314 (1893), this Court held however convenient it is to decide the question, "the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." The Court reinforced this holding in *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920), stating "it is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it." *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157- 158, n.16 (1970).

The need to adhere to the rule limiting review to matters properly in the record is well illustrated by the effort of the

Business *Amici* to rely upon a letter filed by the U.S. State Department's Legal Advisor, William H. Taft in another case, *John Doe I v. Exxon Mobil Corp.*, No. 01-Civ-1357 (D.D.C. June 19, 2001). *See* NFTC Brief at 12, n. 19. In response to the assertions made in the Taft letter, plaintiffs in the *ExxonMobil* case submitted hundreds of pages of evidence, including affidavits from prominent experts on foreign relations, business practices, and terrorism. In order to properly assess any of these issues as they relate to the arguments advanced by the Business *Amici*, all of that evidence would need to be in the record of this case. There are several pending cases, including *John Doe I v. Exxon Mobil,* that may someday provide this Court an opportunity to assess whether claims of economic impact under the ATCA have any legal relevance. The case currently under consideration simply does not involve any of the issues raised by the Business *Amici*.

II. THE U.S. IS A LEADER IN PROMOTING THE RULE OF LAW AND, SINCE NUREMBERG, HAS REJECTED THAT COMPETITIVE ADVANTAGE CAN JUSTIFY VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS.

Virtually every society that respects the rule of law has developed laws that restrain the profit motive. Under U.S. law, for example, companies (and individuals), no matter how profitable it might be, are prohibited from using slaves or engaging in slavery-like practices. *See, e.g.*, U.S. Const. Amend. XIII; Peonage, Slavery & Trafficking in Persons, 18 U.S.C. §1584; *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 383 (E.D.N.Y. 2002) (holding the thirteenth amendment and its enabling statute, 18 U.S.C. §1584, apply to private conduct). Likewise, no company may torture its workers. *See* Torture Victims Protection Act (TVPA), 28 U.S.C. §1350, *note* (1992). To assert otherwise would seem absurd and barbaric. Even free

market economists who otherwise abhor regulation of business activities accept that restraints in law on harmful conduct are required to deter such conduct. Indeed, the rule of law is a necessary component of any free market economy geared towards profit. *See, e.g.*, Thomas Carothers, *The Rule of Law Revival*, Foreign Aff., at 95 (Mar. - Apr. 1998)(noting that the basic elements of a modern market economy, such as property rights and contracts, are founded on the law).

The ATCA has played a unique role in maintaining U.S. leadership with respect to the rule of law and protecting universally recognized human rights. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM J. INT'L L. 461, 493 (1989). *See also* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2397-98 (1991) (noting that the very existence of ATCA jurisdiction has a deterrent effect on potential violators of human rights).

Undeterred by the legal or moral implications of their argument, the Business *Amici* assert that "[ATCA] lawsuits harm the economy by putting companies with a U.S. presence at a unique and unfair competitive disadvantage." NFTC Brief at 10. As there is no question that the conduct of these companies is proscribed by law within the U.S., the essence of the business opposition to the ATCA is that U.S. companies might face liability for their *international* operations. This, they assert, would place U.S. companies at a "competitive disadvantage" with non-U.S. companies, not reachable by the ATCA, which would then presumably remain free to engage in violations of fundamental human rights. *See id.* at 12.

It is difficult to respond on the merits to an "others do it too" argument that would not even get a serious hearing in a

playground dispute. As an initial matter, however, it is simply untrue that the other nations of the world do not have legal procedures for addressing human rights violations. The courts of many European countries have asserted jurisdiction over cases alleging violations of human rights occurring internationally. For example, requests for extradition were issued by the courts of Spain, Belgium and Switzerland for General Augusto Pinochet based on his involvement in gross violations of human rights in Chile. *See* Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches To Past Abuses*, 19 AM U. INT'L. L. REV. 301 (2003). In the corporate context, cases concerning the use of forced labor in Burma were filed against Totalfina Elf in 2002. The first, filed in Belgium, cited "complicity in crimes against humanity." The second, filed in France, cited "complicity in unlawful confinement."[3] *See also* Schalk Willem Burger Lubbe and Cape PLC, House of Lords, Judgment (20 July 2000)(authorizing South African asbestos victims to proceed in UK courts against British asbestos maker Cape PLC).[4]

More fundamentally, the Business *Amici* fail to acknowledge that the U.S. has been a leader, since the Nuremberg Tribunals, in treating fundamental human rights norms as binding and enforceable through the rule of law, regardless of whether other nations permit barbaric behavior. Following Nuremberg, in addition to recent interpretations of the ATCA, there have been numerous laws passed by Congress

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[3] *See, e.g., Total Faces Burmese Forced-Labour Charges*, Financial Times, Aug. 30, 2002 and *Totalfinaelf accused of Forced Labour*, Financial Times, Oct. 23, 2002 (abstracted from Les Echos, Global News Wire).

[4] *Available at* http://www.parliment.the-stationery-office.co.uk.

that act to restrain conduct, by corporations and individuals, that while profitable, are in violation of fundamental societal norms. Key examples are the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78 *et. seq.* (1977), and the TVPA, 28 U.S.C. § 1350, *note*. These laws may arguably place U.S. companies at a competitive disadvantage vis-a-vis non U.S. companies, but Congress has determined that certain egregious conduct simply cannot be the basis for profitability. Turning back the clock on these historic events based on an unproven allegation of "competitive disadvantage" would do more than nullify the ATCA.

A. The Nuremberg Tribunals Established that No Civilized Society Permits a Company to Profit from Slavery and Other Fundamental Human Rights Violations.

At Nuremberg, the Allies, led by Justice Robert H. Jackson, inspired the world by bringing Nazi war criminals, including companies that aided and abetted the Nazis, to justice in a court of law. Justice Jackson "had a passionate conviction of the need to transform international law from a mere collection of hopes into an effective binding set of rules to govern the behavior of nations. He believed that international law was the only means for realizing man's wish for peace." *See* Ann Tusa and John Tusa, The Nuremberg Trial, 68 (Cooper Square Press, 2003 ed.).

In one of the key Nuremberg cases, *United States v. Friedrich Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952) (hereinafter "TWC"), the Tribunal found Flick, the owner of a freight car business guilty of slavery and crimes against humanity based on his knowledge and approval of his company's decision to increase its production quota knowing

forced labor would be required to meet the increase. The Tribunal held Flick legally responsible for profiting from the Nazi slave labor program although he did not "exert any influence or [take] any part in the formation, administration or furtherance of the slave-labor program." TWC at 1198. The critical basis for liability was Flick's approval of the decision to increase company revenues knowing that such a decision would result in the use of forced labor. *Id.* at 831.

Similarly, in *United States v. Karl Krauch*, 8 TWC (1952), the Tribunal found Krauch guilty although, as in the *Flick* case, he did not create the slave labor program or control the allotment process. Krauch simply made an affirmative decision to conduct business knowing that it would result in the use of forced labor. For this the Tribunal found him guilty, stating, "Krauch was neither a moving party or an important participant in the initial enslavement of workers . . . [but] in view of what he clearly must have known about the procurement of forced labor and the part he voluntarily played in its distribution and allocation, his activities . . . impel us to hold that he was a willing participant in the crime of enslavement." *Id.* at 1189.

Demonstrating the extreme de-evolution in law sought by the Business *Amici*, the NFTC Brief and others argue that U.S. businesses operating in the global economy should not even have to answer in court to charges that a company knowingly aided and abetted a government that uses slave labor. *See* NFTC Brief at 11. Obviously sensitive to the image of U.S. businesses rallying to repudiate the Nuremberg Tribunals, the Business *Amici* instead attack as improper the Ninth Circuit's citation in the *Unocal* case to the *ad hoc* international criminal

tribunals established for the former Yugoslavia and Rwanda.[5] *Id.* However, these subsequent tribunals explicitly relied upon the historic rulings at Nuremberg in making their findings of liability. For example, in *Prosecutor v. Dusko Tadic*, ICTY-94-1 (May 7, 1997)[6] the Yugoslavia Tribunal noted that "[t]he most relevant sources ... are the [Nuremberg] war crimes trials, which resulted in several convictions for complicitous conduct." *Id.* at ¶ 674.

Nuremberg was not an aberration – it was a demonstration to the world of using the rule of law as an alternative to violence, a lesson especially applicable at the present time. The United Nations specifically ratified the Nuremberg Tribunals as a major step forward in elevating universal human rights norms to the status of law.[7] The position of the Business *Amici* that they are at a competitive disadvantage due to the ATCA's constraints prohibiting slavery and other fundamental human rights violations would open the door to an alarming return to barbaric behavior. As the next two sections demonstrate, Congress has acted in recent times to reinforce that "competitive disadvantage" cannot outweigh the fundamental

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[5] *John Doe I v. Unocal Corp.*, 2002 WL 31063976 * 9-10 (9th Cir. 2002)(emphasis added), *vacated and reh'g granted en banc*, 2003 WL 359787 (9th Cir. Feb 14, 2003), *submission withdrawn pending decision in this case*. Subsequent federal cases have relied upon these tribunals in ATCA cases. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 323 (S.D.N.Y. 2003).

[6] *Available at* http://www.un.org.icty/tadic/trialc2/judgment/index.htm

[7] *See, e.g., Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal*, G.A. Res. 95(1), U.N. GAOR, 1st Sess., Part II at 188, U.N. Doc. A/64/Add.1 (1946).

values of our society.

B. The Foreign Corrupt Practices Act Was Passed Despite Express Concerns by U.S. Business That They Would Be Placed at a Competitive Disadvantage.

The idea that corporations should be free to obtain the greatest competitive advantage in the marketplace, without regard to the social or moral costs of their conduct, was rejected by Congress in the context of addressing corruption. In 1977, Congress passed the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-2, 78ff, to criminalize, *inter alia*, the bribery of any "foreign official" by "any domestic concern" in order to "obtain or retain business." Additionally, the FCPA introduced new reporting and disclosure requirements to increase the transparency of international business transactions. The legislation was necessary to repair America's tarnished image and increase confidence in the integrity of U.S. corporations in the late 1970s. Indeed, as the legislative history of the FCPA reveals, the law was introduced after Securities and Exchange Commission investigations revealed "corrupt foreign payments by over 300 U.S. companies involving hundreds of millions of dollars." S. Rep. No. 95-114, 1977 WL 16144 at *3-4 (May 2, 1977). The rationale for passing the anti-corruption legislation was that:

> Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality and service. Corporate bribery is fundamentally destructive of this basic tenet. . . Thus foreign corporate bribery affects the very stability of overseas business. *Id.* at *4.

The law was passed despite an outcry from U.S. businesses claiming that the FCPA put them at a competitive disadvantage with respect to their European counterparts. These concerns were cited time and again in the House and Senate debates leading up to the ratification of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention"). *See, e.g.* 144 Cong. Rec. S4220-01, 1998 WL 215554 (May 4, 1998)(noting "United States corporations have contended that this [the FCPA] has put them at a significant disadvantage in competing for international contracts with respect to foreign competitors who are not subject to such laws").

Thus, in the face of this alleged competitive disadvantage, the U.S. Congress chose to aggressively promote anti-corruption measures internationally, rather than relax such standards at home. Indeed, Congress explicitly encouraged the negotiation of an anti-corruption agreement within the Organization for Economic Cooperation and Development ("OECD") during the Reagan Administration in the Omnibus Trade and Competitiveness Act of 1988. As of 2003, 34 nations ratified the Convention, which requires the signatories to enact domestic legislation to combat foreign bribery.[8] Later, the U.S. Senate ratified the Inter-American Convention Against Corruption on July 27, 2000, which binds the governments of the Western Hemisphere to combat corrupt practices in international business.[9]

The experience with the FCPA amply demonstrates that the solution to perceived or actual disadvantage in business

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[8] *See* http://www.oecd.org/dataoecd/59/13/1898632.pdf.

[9] *See* http://www.oas.org/juridico/english/Treaties/b-58.html.

relations is not to find the lowest common denominator, as suggested by the Business *Amici*, but to promote respect for those principles among other nations internationally. The combined power of the Business *Amici* and the U.S. government would have been better spent drafting a multilateral mechanism to ensure global compliance with human rights standards than seeking to eradicate the ATCA.

C. The Torture Victims Protection Act Likewise Applies to Prohibit Torture and Extrajudicial Killing Regardless of Economic Impact.

Congress passed the TVPA, 28 U.S.C. § 1350, *note*, to prohibit torture and extrajudicial killing. *See* S. Rep. No. 102-249, 1991 WL 258662, *3 (Nov. 26, 1991). While Respondents, and several other *amici* in support of Respondents, address in detail the significance of the passage of the TVPA in confirming the ongoing validity of the ATCA, the passage of the TVPA also resoundingly confirms that extreme human rights violations, such as torture and extrajudicial killing, are universally condemned and prohibited by U.S. law, even if there is an impact on the way U.S. companies do business.

It is significant to note that in attacking the ATCA, the Business *Amici* cite the TVPA as an example of a clear, if not model, statutory scheme to regulate international violations of human rights. *See, e.g.*, NFTC Brief at 27-28. However, the Business *Amici* fail to disclose that individual companies when sued under the TVPA have argued specifically that the TVPA does not apply to corporations. *See, e.g., Estate of Rodriquez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003) (rejecting defendants' argument that the TVPA by its plain language applies only to "individual" defendants, not

corporate entities); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla. 2003)(also rejecting defendants' argument that they, as corporations, should not be liable to suit under the TVPA). Likewise, in its pending motion to dismiss, Exxon Mobil Corporation argued that it is not subject to the TVPA as a corporate entity. *See John Doe I v. Exxon Mobil Corp.*, No. 01-1357 (D.D.C. filed June 19, 2001), Defendants' Motion to Dismiss at 22 (filed on October 1, 2001). While this reveals that the Business *Amici* have an underlying agenda to be free from all binding human rights regulation, the reality is that the TVPA does apply to individuals and corporations, and it prohibits torture and extrajudicial killing regardless of whether there is an economic impact.

III. THE ATCA, AS INTERPRETED AND APPLIED BY THE FEDERAL COURTS, ESTABLISHES A CLEAR STANDARD OF PROHIBITED CONDUCT.

The Business *Amici* argue that their alleged competitive disadvantage from being bound to fundamental human rights standards under the ATCA is magnified by "enormous uncertainty regarding the scope of potential claims under the statute." NFTC Brief at 10-11. This argument is disingenuous on two fundamental levels. First, following *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the law has been remarkably consistent in defining the scope and source of the "law of nations" for purposes of the ATCA. Second, knowing that the law is clear, the Business *Amici* resort to using ***allegations*** made in various ATCA cases as the basis for demonstrating the lack of certainty. The Business *Amici* fail to disclose that the parade of allegations they use are from cases in which the claims were dismissed precisely because they were not within the scope of the ATCA's "law of nations." This not only demonstrates a lack of candor with the Court, but also

reinforces that the objective of the Business *Amici* is not clarification of the ATCA standard, but nullification of the ATCA and immunity from the law.

A major issue addressed by the Respondents, as well as other *amici*, is the scope and source of the "law of nations" for purposes of defining actionable torts under the ATCA. In responding to the Business *Amici's* competitive disadvantage argument, however, it is also necessary to briefly address this issue. Based on actual decisions made by courts, as opposed to allegations that have been or could be made, the list of actionable torts under the ATCA is short and precise:genocide,[10] war crimes,[11] extrajudicial killing,[12] slavery,[13] torture,[14] arbitrary detention,[15] and crimes against

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[10] *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1996)(violent acts with the intent to destroy religious and ethnic groups constitute genocide); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289 (S.D.N.Y. 2003) (campaign of ethnic cleansing directed against non-Muslim population of Sudan constituted genocide under the ATCA).

[11] *See, e.g., Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998) (also recognizing systemic rape as a tool of war).

[12] *See, e.g., Kadic*, 70 F.3d at 240–41, 243–44 (noting that when Congress passed the TVPA, it codified the ATCA's application to extrajudicial killing and torture); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) (finding jurisdiction under the ATCA and TVPA for the extrajudicial killing of plaintiff in Chile by a member of the Chilean military).

[13] *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1307–08 (C.D. Cal. 2000) *(citing Kadic*, 70 F.3d at 234); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794 (D.C. Cir. 1984)(Edwards, J., concurring), *cert.*

humanity.[16] Indeed, the restatement on foreign relations adopts this list of the "international law of human rights," adding only "systematic racial discrimination" to the finite list consistently cited by federal courts in ATCA cases.[17] RESTATEMENT (THIRD)

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denied, 470 U.S. 1003 (1985); *NCGUB v. Unocal Inc.*, 176 F.R.D. 329, 348 (C.D. Cal. 1997); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.N.J. 1999).

[14] *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 847–48 (11th Cir. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995). The TVPA specifically defines "torture" to include "mental pain or suffering" resulting from "the threat of imminent death." 28 U.S.C. § 1350, Historical and Statutory Notes § 3(b)(1)–(2)(C) (1993). The definition of "torture" under the TVPA is the same as under the Torture Convention. *See* S. REP. NO. 102–249, 1991 WL 258662, at *6. The related concept of "cruel, inhuman, or degrading treatment" has also been recognized. *See Cabello*, 157 F. Supp. 2d at 1361.

[15] *See, e.g., Abebe-Jira*, 72 F.3d at 844; *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998). A related concept is "disappearance,"which has been defined as "abduction by state officials or their agents," followed by "official refusals to acknowledge the abduction or to disclose the detainee's fate." *See Forti v. Suarez-Mason*, 694 F. Supp. 707, 711 (N.D. Cal. 1988).

[16] *See, e.g., Kadic*, 70 F.3d at 240–44; *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, *9 (S.D.N.Y. 2002) (defining crimes against humanity as, inter alia, "torture . . . [and] inhumane acts . . . intentionally causing great suffering or serious injury to body or mental or physical health").

[17] In one case, three Colombian trade union leaders who were murdered in the course of negotiations with their employer over a dispute regarding their collective agreement were found to have stated claims for extrajudicial killing under the ATCA. *See Estate of Rodriquez*, 256 F. Supp. 2d at 1267. In addition, the court held that Plaintiffs had also

FOREIGN RELATIONS LAW § 702 (1987). The limited scope of the ATCA is due largely to the rigorous standard adopted by the Second Circuit in *Filartiga*. The court held that an ATCA claimant must demonstrate a violation of "'a settled rule of international law'" recognized by "'the general assent of civilized nations.'" *Filartiga*, 630 F.2d at 881(*quoting, The Paquete Habana*, 175 U.S. 677, 694 (1900)).

Anticipating the exact argument now made by the Business *Amici*, the Second Circuit stated that "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one." *Id.* at 886. The court rejected the notion that it or any other court had the ability to simply pick and choose laws from an international menu. The court interpreted the ATCA "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." *Id.* at 887.

Post-*Filartiga*, courts applying the ATCA have continued the tradition of a rigorous and restrained approach, and limit the ATCA's reach to "'well-established, universally recognized norms of international law.'" *Kadic*, 70 F.3d at 239 (*quoting Filartiga*, 630 F.2d at 888). *See also In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467,1475 (9th Cir. 1994).

That Courts across the country respect the very limited

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stated a claim for violation of the right to associate. *Id.* at 1262-63. The ruling makes clear, however, that the violation was dependant upon the violent repression of the right to associate. *See id.* Another federal district court refused to recognize a fundamental right to associate under any circumstance. *See Aldana v. Fresh Del Monte Produce, Inc.*, 2003 WL 23205157, *9-10 (S.D. Fla. 2003).

scope of the ATCA is demonstrated convincingly by the types of claims that have been dismissed. In fact, most of the cases cited by the Business *Amici* resulted in the claims being dismissed for being beyond the narrow confines of universally recognized norms. For example, the Business *Amici* assert with derision that "residents of Peru" sued for "violations of their 'right to life,' 'right to health,' and right to sustainable development.'" Further, the plaintiffs alleged that significant health impacts on children living near the mining operations in Peru violated "'the right of the child to the enjoyment of the highest attainable standard of health.'" NFTC Brief at 6. While the Business *Amici* describe this assertion of claims as a symptom of all that is wrong with the ATCA, *see* NFTC Brief at 5-8, the undisclosed truth is that the claims at issue were dismissed by the district court and the dismissal was affirmed by the Second Circuit. *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003). Likewise, the claims described in the NFTC Brief at 7 for environmental torts and cultural genocide in the *Beanal* case were dismissed by the district court, and the Fifth Circuit affirmed the dismissal. *Beanal v. Freeport-McMoran, Inc.*, 197 F. 3d 161, 167-68 (5th Cir. 1999).

The Business *Amici* present a litany of various unratified treaties and conventions dealing with issues such as economic and cultural rights, and the rights of children, that have been asserted in ATCA cases, but buried in footnotes are the references to the only two reported cases in which these assertions were made – *Flores* and *Beanal* – both of which were dismissed with prejudice. *See* NFTC Brief at 8-9, ns. 8-11. In short, the best case the Business *Amici* could make with their abundant legal resources that the ATCA has run amuck was that some plaintiffs have made ATCA claims that were promptly

dismissed by the courts. The system is working fine.[18]

As demonstrated above, based on more than 20 years of recent applications, the ATCA applies to genocide, war crimes, extrajudicial killing, slavery, torture, unlawful detention, and crimes against humanity. To expand this list requires the heavy burden of showing new universal consensus. Responsible business leaders can be certain that if their companies are knowingly engaged[19] in any of these prohibited torts, they may be sued under the ATCA. No party can be liable for an inadvertent violation, and in this era when companies are boasting comprehensive social responsibility programs,[20] it is

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[18] That it is possible to file baseless claims under the ATCA is not an argument for curtailing the use of the ATCA. This problem is common to litigation in general, and the federal courts have specific mechanisms to curb such abuse. *See, e.g.*, Fed. R. Civ. P. 11(b)(2) (requiring attorneys to certify that the claims filed are "warranted by existing law or by a nonfrivolous argument").

[19] There is no question that in order to face ATCA liability, a party must either be the direct perpetrator of the actionable conduct or knowingly aid and abet the direct perpetrator. The sole appellate court to reach this issue in the corporate context was the Court of Appeals for the Ninth Circuit in Unocal. There the court reinforced that even an aiding and abetting situation requires ***knowing*** practical assistance or encouragement that has a substantial effect on the perpetration of the crime." *John Doe I v. Unocal Corp.*, 2002 WL 31063976, * 9-10 (9th Cir. 2002)(emphasis added), *vacated and reh'g granted en banc*, 2003 WL 359787 (9th Cir. Feb. 14, 2003), *submission withdrawn pending decision in this case*.

[20] *See* section IV, *infra*, for a discussion of various corporate accountability programs that require companies to actively assess compliance with a wide range of human rights and labor standards.

reasonable to assume that these companies are at least able to state with certainty that no part of their business is associated with any of the heinous crimes actionable under the ATCA.

IV. CORPORATE MEMBERS OF THE BUSINESS *AMICI* CLAIM TO ACCEPT STANDARDS OF VARIOUS CORPORATE SOCIAL RESPONSIBILITY PROGRAMS THAT FAR EXCEED THE FUNDAMENTAL HUMAN RIGHTS NORMS COVERED BY THE ATCA.

Most of the country's largest corporations claim to not only support human rights, but to be bound by various corporate social responsibility programs that set standards much higher than the extreme human rights violations covered by the ATCA. However, these same companies are before this Court, camouflaged by their membership in the various Business *Amici* that filed the NFTC Brief,[21] arguing that they will suffer a competitive disadvantage if the Court affirms the ATCA's application to crimes such as slavery and torture. There are many terms to describe this posturing, but for purposes of this case, the key conclusion is that these companies have utterly failed to demonstrate that they cannot compete in the world

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[21] These groups include: the National Foreign Trade Council (http://www.nftc.org); USA Engage (http://www.usaengage.org/about_us/members/index.html); the American Petroleum Institute (http://api-ec.api.org/links/); US Council for International Business (http://www.uscib.org/index.asp?documentID=1846); US-ASEAN Business Council (http://www.us-asean.org/Aboutus/board_of_directors.asp); and the Business Roundtable (http://www.Businessroundtable.org/pdf/members.pdf). These websites provide the membership lists for these organizations, including memberships held by Exxon Mobil, Unocal Corporation, and Coca-Cola, which are specifically discussed herein.

constrained by the ATCA. If we take them at their public word, these companies are competing in the world while honoring the highest possible human rights standards. A few examples below will highlight what leading members of the Business *Amici* say they are doing to comply with human rights standards, which far exceed those covered by the ATCA.

A. Exxon Mobil Corporation

Depending on how it is measured, Exxon Mobil is either the first or second largest company in the world, and is certainly the largest oil company in the world.[22] Exxon Mobil is a leading member of several of the Business *Amici* that filed the NFTC Brief, including the National Foreign Trade Council, USA Engage, the American Petroleum Institute, US Council for International Business, US-ASEAN Business Council, and the Business Roundtable.[23] Thus, Exxon Mobil is firmly behind the positions taken in the NFTC Brief, including the argument that the ATCA places U.S. companies at competitive disadvantage.

Nevertheless, to its shareholders and the public at large, Exxon Mobil asserts that compliance with human rights standards is a high priority for the company. Indeed, Exxon Mobil states that it plays an active role in using its influence to instill respect for the rule of law: "In nations that lack well-developed legal and commercial systems, we seek ways to establish and strengthen appropriate institutions and norms. We emphasize the necessity of honoring agreements and the primacy of the law in resolving disagreements. We believe this

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[22] BBC News, *Exxon Profits Soar on Higher Price,* July 31, 2003, *at* http://news.bbc.co.uk/1/hi/business/3114153.stm.

[23] *See* note 21, *supra.*

is an often-overlooked positive impact that business can have on the social fabric of a country."[24] On the specific issue of human rights, Exxon Mobil asserts:

> We strongly believe that corporations have an important role to play in promoting respect for human rights. . .
>
> ExxonMobil condemns human rights abuses. We make it clear to all of our employees and contractors - as well as police and military forces that provide security to our operations - that human rights violations will not be tolerated.[25]

Further, ExxonMobil is a member of the *Voluntary Principles on Security and Human Rights*, which is a program initiated by the governments of the United States and the United Kingdom to work with companies in the mineral extractive sectors to develop principles to improve respect for human rights, particularly in addressing security issues.[26] The participants pledge "that we share the common goal of promoting respect for human rights, particularly those set forth in the Universal Declaration of Human Rights, and international

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[24] Exxon Mobil's Corporate Citizenship Report, http://www.exxonmobil.com/corporate/files/corporate/CCR2002_commitment.pdf at 28.

[25] *Id.*

[26] The U.S. government participates in this initiative through the U.S. Department of State. Details of the program are available at http://www.state.gov/g/drl/rls/2931.htm (last visited Feb. 25, 2004).

humanitarian law."[27]

B. Unocal Corporation

Unocal is also a leading member of most of the Business *Amici* that filed the NFTC Brief, including the National Foreign Trade Council, USA Engage, the US Council for International Business, the American Petroleum Institute, and the US-ASEAN Business Council.[28] Its shareholders and the public would no doubt be surprised that Unocal ascribes to the arguments made in the NFTC Brief given the company's public commitment to company compliance with human rights norms:

> Unocal supports the principles and aspirations of the Universal Declaration of Human Rights. We also recognize certain universally relevant workplace principles: freedom from discrimination in employment, elimination of child labor, freedom from forced labor and freedom of association and collective bargaining. . . Unocal believes that we have a responsibility to society, especially in relation to the impact of our operations. . . Managers are responsible for ensuring that any security arrangements developed for a Unocal-operated location consider the US/UK Voluntary Principles on Security and Human Rights.[29]

As noted in the quote, Unocal, like ExxonMobil, is a

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[27] *Id.* at 1.

[28] *See* note 21, *supra*.

[29] *See* http://www.unocal.com/ucl_code_of_conduct/index.htm at 1.

member of the U.S. government's *Voluntary Principles on Security and Human Rights* initiative.[30] Unocal also references one of the most significant and comprehensive corporate social responsibility programs, the UN Global Compact. This program, initiated by the United Nations, establishes Nine Principles that participating companies must implement.[31] Principle One is that "businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence."[32] The rationale for this commitment by participating companies is: "***[a] growing moral imperative to behave responsibly is allied to the recognition that a good human rights record can support improved business performance.***"[33]

Unocal not only accepts that compliance with human rights is good for business, it specifically disavows the competitive disadvantage argument of the NFTC Brief: "basic human values and high standards of ethical conduct have always been a central part of Unocal's approach to business and ***critical to our company's success.***"[34]

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[30] *See* note 26, *supra* and the accompanying text.

[31] *See generally*, http://www.unglobalcompact.org.

[32] *Id.* at 1.

[33] *Id.* at 1 (emphasis added).

[34] *See* http://www.unocal.com/responsibility/humanrights/hr1.htm (emphasis added)

C. The Coca-Cola Company

Coca-Cola is also heavily represented in the NFTC Brief by its membership in USA Engage, US Council for International Business, US-ASEAN Business Council, the Business Roundtable, and it is on the Board of Directors of the U.S. Chamber of Commerce.[35] Coca-Cola, as is typical of many international companies, has a code of conduct that includes specific requirements for compliance with health and safety regulations, respect for the right of employees to form unions and bargain collectively, and that prohibits the use of forced labor or child labor.[36] These specific and detailed provisions far exceed the limited scope of the ATCA's "law of nations," as applied by the federal courts. Coca-Cola requires its suppliers to comply with the code requirements because "good corporate citizenship is essential to our long-term business success and must be reflected in our relationships and actions in the marketplace, the workplace, the environment and the community."[37]

This sampling of three major U.S. companies is representative of the individual corporations that are members of the various Business *Amici*. Virtually all of the hundreds of companies that make up the Business *Amici* publically extol their commitment to human rights in their global operations.

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[35] *See* http://www.uschamber.com/about/board/all.htm, listing the Chamber's Board of Directors. For membership in the other bodies listed, see note 21, *supra*.

[36] Coca-Cola's Code of Business Conduct *at* http://www2.coca-cola.com/ourcompany/pdf/business_conduct_codes.pdf

[37] *Id.*

See generally, Prakash Sethi, *Setting Global Standards: Guidelines for Creating Codes of Conduct for Multinational Corporations* (New York: John Wiley and Sons, Inc., 2003)(noting the economic incentive for companies to market themselves as socially responsible, but criticizing the practice of some multinationals of failing take their public commitments seriously). The expansion and vitality of these programs is a thriving rebuttal to the notion that U.S. companies must be freed from the "burden" of observing the universal human rights standards enforceable through the ATCA. Through the work of CSR *Amici,* companies in today's market understand that they are rewarded for being socially responsible. That explains why the corporate members of the Business *Amici* are not waging a public campaign in their own names against the ATCA. It does not explain how any company that makes a good faith public commitment to respect human rights can assert even indirectly that the ATCA's very limited application to extreme forms of human rights violations will subject them to any economic impact.

It bears noting that some of these apparently conflicted corporations will undoubtably take their public commitments to a broad range of human rights more seriously if the ATCA remains a viable check to ensure that extreme violations of human rights are actionable in federal court. *See supra*, Harold Koh, 100 Yale L.J. at 2397-98 (noting that the possibility of ATCA suit serves as a significant deterrent to human rights violations).

CONCLUSION

The Court should disregard the arguments made by the Business *Amici*. There is no issue of economic impact properly before this Court. Moreover, the Business *Amici* have failed to

make the case that economic impact has any bearing on the application of the ATCA to fundamental human rights violations. More important, the legacy of Nuremberg and U.S. leadership on using the rule of law to address barbaric behavior cannot be sacrificed to the untenable position that the ATCA's application to such extreme human rights violations as slavery and torture places U.S. companies at a competitive disadvantage.

Respectfully submitted.

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JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PROFESSORS OF FEDERAL JURISDICTION AND LEGAL HISTORY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors with expertise in federal jurisdiction and legal history who have an interest in the proper understanding and interpretation of the Judiciary Act of 1789 and of the provision of that Act commonly known as the Alien Tort Statute (ATS). Petitioner and other *amici* who have already filed briefs in this case have advanced certain arguments that are, in our view, inconsistent with the history and text of the ATS. We respectfully submit this brief in order to clarify the history of the ATS and how that history bears upon its proper interpretation. We take no position on the second question presented (the law-of-nations standard for determining which torts are actionable under the ATS) or on the third question presented (whether the specific torts at issue in this case are actionable under the ATS).

SUMMARY OF ARGUMENT

Section 9 of the First Judiciary Act provided that the district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." An Act to establish the Judicial Courts of the United States ("Judiciary Act"), ch. 20, § 9, 1 Stat. 73,

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than the *amici curiae* or their counsel made any monetary contribution to the preparation and submission of this brief. Petitioner and respondent have given blanket consents to the filing of *amicus* briefs. The written consent of the United States accompanies this brief.

77 (1789). This provision, commonly known as the Alien Tort Statute ("ATS"), is now codified at 28 U.S.C. § 1350.[2]

Petitioner argues that the First Congress did not intend for aliens to be able to bring suits under the ATS for torts in violation of the law of nations unless Congress passed a further statute authorizing such suits. Other *amici* argue in the alternative that jurisdiction under the ATS is limited to a category of suits narrower than "all causes where an alien sues for a tort only in violation of the law of nations." 1 Stat. at 77. As a historical matter, these arguments are mistaken. The history and text of the ATS establish three basic propositions: (1) the First Congress intended to provide a *federal forum* for alien tort suits; (2) the First Congress understood such suits to be cognizable *at common law* without the need for further congressional action; and (3) the First Congress intended the district courts to have jurisdiction over "*all*" such torts, not just those that occurred within the territory of the United States or those that were recognized in 1789.[3]

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[2] As presently codified, § 1350 reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. It has never been suggested that any change in wording upon codification was intended to alter the scope of this provision.

[3] As Professor Casto has noted, "[n]otwithstanding frequent complaints about the obscurity of section 1350's origins, a thorough study of available historical materials provides a fairly clear understanding of the statute's purpose." William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 488-89 (1986); *see also* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985); Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221 (1996).

ARGUMENT

Properly framed, the question in this case is not whether the ATS itself creates a cause of action, but rather whether the First Congress understood that further congressional action would be necessary before aliens could bring suits for torts in violation of the law of nations. Petitioner's argument assumes that a right to sue may be created only by statute. The history and text of the ATS demonstrate, to the contrary, that the First Congress understood that torts in violation of the law of nations were cognizable at common law. The history and text of the ATS further show that the First Congress intended to provide a federal forum for these suits and that the district courts' jurisdiction should extend to "all" such suits.

I. THE FIRST CONGRESS INTENDED TO PROVIDE A FEDERAL FORUM FOR CASES WHERE AN ALIEN SUES FOR A TORT ONLY IN VIOLATION OF THE LAW OF NATIONS.

Under the Articles of Confederation, the national government had little authority to provide remedies for violations of the law of nations. This experience proved to the First Congress the importance of providing a federal forum for such violations. As James Madison complained, "[t]hese articles [of confederation] contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." THE FEDERALIST NO. 42, at 264, 265 (J. Madison) (C. Rossiter ed.,

1961). Although suits for torts in violation of the law of nations could have been brought in state court, the Framers thought a federal forum was important in order to promote uniformity in the interpretation of the law of nations, because they feared that state courts might be hostile to alien claims, and because they felt it was their duty to provide that the law of nations be respected and obeyed.

A. THE EXPERIENCE UNDER THE ARTICLES OF CONFEDERATION DEMONSTRATED THAT TORTS IN VIOLATION OF THE LAW OF NATIONS SHOULD NOT BE LEFT EXCLUSIVELY TO THE STATES.

The problem of redressing violations of the law of nations arose repeatedly during the decade before passage of the First Judiciary Act, and the Continental Congress consistently demonstrated its concern with providing not just criminal penalties but also civil damages. As early as 1779, the Congress wrote to assure the Minister Plenipotentiary of France that the courts "will cause the law of nations to be most strictly observed: that if it shall be found, after due trial, that the owners of the captured vessels have suffered damage from the misapprehension or violation of the rights of war or neutrality, Congress will cause reparation to be made . . ." 14 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 635 (W.C. Ford ed., 1909). But while the Articles of Confederation gave the national government and its courts authority over violations of the law of nations on the high seas, *see* ARTICLES OF CONFEDERATION, art. 9, § 1, 1 Stat. 4, 6 (1778), the national government lacked authority over such violations on land.

To address this problem, the Continental Congress passed a resolution in 1781 recommending to the States that they "provide expeditious, exemplary and adequate punishment" for violations of the law of nations and treaties to which the United States was a party. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1136-37 (G. Hunt ed., 1912). The resolution listed several law-of-nations violations, including violations of safe-conducts and "infractions of the immunities of ambassadors and other public ministers." *Id.*[4] It also recommended that the States "erect a tribunal in each State, or . . . vest one already existing with power to decide on offences against the law of nations, not contained in the foregoing enumeration." *Id.* at 1137. Finally, the resolution recommended that the States "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." *Id.*[5] The Congress thus envisioned two types of civil suits: (1) tort suits by the

[4] The enumeration followed Blackstone, who stated that "[t]he principal offences against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4 WILLIAM BLACKSTONE, COMMENTARIES *68. The resolution made no mention of piracy because Congress had exclusive authority under the Articles of Confederation to provide for the trial of piracies. *See* ARTICLES OF CONFEDERATION, art. 9, § 1, 1 Stat. 4, 6 (1778) ("The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas . . .").

[5] As Professor Casto has explained, "[t]he citizen limitation literally applies only to the indemnity action by the United States and is separated from the recommended alien's tort claim provision by a comma. This different treatment makes sense because it is very unlikely that the United States would pay compensation for an injury done by a non-citizen." Casto, *supra*, at 499 n.179.

injured party against the tortfeasor, and (2) suits by the United States against the tortfeasor to indemnify it for compensation paid to the injured party. This 1781 resolution of the Continental Congress is acknowledged to be "the direct precursor of the alien tort provision in the First Judiciary Act." Slaughter, *supra*, at 477; *see also* Dodge, *supra*, at 226-29; Casto, *supra*, at 490-91. The following year, Connecticut passed "An Act for securing to Foreigners in this State, their Rights, according to the Laws of Nations, and to prevent any Infractions of said Laws," which criminalized specific violations of the law of nations and "any other Infractions or Violations of or Offenses against the known received and established Laws of civilized Nations." *See* Acts and Laws of the State of Connecticut, in America 82, 83 (1784). The Connecticut act also provided a broad tort remedy for injuries "to any foreign Power, or to the Subjects thereof." *Id.*

The 1784 Marbois Affair highlighted the importance of redressing violations of the law of nations. In May 1784, the Chevalier De Longchamps, a French citizen, assaulted Francis Barbe Marbois, the French Consul General, on a Philadelphia street. *See Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 111 (1784). "The Marbois Affair was a national sensation that attracted the concern of virtually every public figure in America." Casto, *supra*, at 492. The French Ambassador formally complained to the Continental Congress, and the Dutch Ambassador threatened to leave the State unless action were taken. *See id.* at 491-92 & n.138. De Longchamps was ultimately tried and convicted by the Pennsylvania Supreme Court for an offense against the law of nations, which the court held to be "in its full extent, . . . part of the law of this State." *De Longchamps*, 1 U.S. (1 Dall.) at 116. But the national government was powerless. As the Congress explained to Marbois, its authority was limited by "the nature of a federal union in which each State retains a distinct and absolute sovereignty in all matters not expressly delegated to Congress leaving to them only that of advising in many of those cases in which other governments decree." 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 314 (J.C. Fitzpatrick ed., 1933). When a similar incident involving the Dutch Ambassador in New York City arose four years later, John Jay, then Secretary for Foreign Affairs, complained that "the foederal Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases." 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 111 (R.R. Hill ed., 1937).

The new Constitution at last gave the national government authority to redress violations of the law of nations, and the First Congress acted swiftly to implement the recommendations of the 1781 resolution. It passed an act providing criminal penalties for violations of safe-conducts and assaults on ambassadors and public ministers. See An Act for the Punishment of certain Crimes against the United States, ch. 9, § 28, 1 Stat. 112, 118 (1790). It gave the federal courts jurisdiction over crimes "cognizable under the authority of the United States," Judiciary Act, ch. 20, §§ 9 & 11, 1 Stat. at 76-77, 78-79, which would have included both statutory and common-law offenses against the law of nations. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73, 77 (1923); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1016 (1985).[6]

[6] This Court later limited federal criminal jurisdiction to statutory offenses. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

And it implemented the 1781 resolution's recommendation on civil suits by granting the district courts jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act, ch. 20, § 9, 1 Stat. at 77. In each case, Oliver Ellsworth appears to have played a leading role. Ellsworth had been a member of both the Continental Congress that passed the 1781 resolution and the Connecticut General Assembly that passed the 1782 act. *See* Dodge, *supra*, at 231. He chaired the Senate committee that reported the Act for the Punishment of certain Crimes against the United States, *see* Casto, *supra*, at 495 n.156, and was the principal drafter of the First Judiciary Act, specifically authoring Section 9, which contains the alien tort provision.[7]

B. A FEDERAL FORUM WAS IMPORTANT TO PROMOTE UNIFORMITY, TO AVOID HOSTILE STATE COURTS, AND TO DISCHARGE THE NATION'S DUTY TO PROVIDE REDRESS FOR VIOLATIONS OF THE LAW OF NATIONS.

Suits for torts that violated the law of nations could have been brought in state courts, and indeed the ATS specified that the district courts' jurisdiction over these torts would be "concurrent with the courts of the several States." Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77.[8] There were several reasons, however, for the First Congress to make a federal forum available. First, providing a federal forum would promote uniformity in the interpretation of the law of

[7] Section 9 of the Judiciary Act was Section 10 of the bill submitted to Congress, and this section appears in Ellsworth's handwriting. *See* Warren, *supra*, at 50, 73.

[8] Petitioner's arguments to the contrary are addressed at length in Part II.

nations. John Jay expressed this idea in defending the new Constitution's grant of judicial power:

> Under the national government, treaties . . . as well as the laws of nations, will always be expounded in one sense . . . whereas adjudications on the same points and questions in thirteen States . . . will not always accord or be consistent . . . . The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended.

THE FEDERALIST NO. 3, at 41, 43 (J. Jay) (C. Rossiter ed., 1961); *see also* THE FEDERALIST NO. 80, at 475, 476 (A. Hamilton) (C. Rossiter ed., 1961) ("cases arising upon treaties and the laws of nations . . . may be supposed proper for the federal jurisdiction.").[9]

Second, the First Congress had reason to fear that state courts would be hostile to aliens' claims. *See* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1440-53 (discussing the difficulties that British creditors had collecting their debts in state courts). As James Madison put it while defending the Constitution's grant of alienage jurisdiction: "We well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us." 3 THE DEBATES IN THE SEVERAL

[9] The ATS did not guarantee uniformity in the interpretation of the law of nations, since aliens were free to bring their tort claims in state courts, but it at least gave aliens the option of seeking a uniform federal interpretation.

STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (J. Elliot ed., 1836).

Third, the First Congress viewed it as the duty of every government to provide redress for violations of the law of nations. Blackstone had written that "where the individuals of any state violate this general law [of nations], it is then the interest as well as *duty* of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained." 4 BLACKSTONE, *supra*, at *68 (emphasis added). In the *De Longchamps* case, the Pennsylvania Supreme Court had similarly emphasized that it was "the interest as well as *duty* of the government" to punish violations of the law of nations. *De Longchamps*, 1 U.S. (1 Dall.) at 117 (emphasis added). When the United States gained independence, that duty became its duty. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), Chief Justice John Jay observed that "the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their *duty* to provide, that those laws should be respected and obeyed." *Id.* at 474 (emphasis added). As Professor Slaughter has written, "[t]he Alien Tort Statue was a direct response to what the Founders understood to be the nation's *duty* to propagate and enforce those international law rules that directly regulated individual conduct." Slaughter, *supra*, at 475; *see also id.* at 481-88.

Petitioner would have this Court believe that Oliver Ellsworth and the other members of the First Congress, having been concerned to provide civil redress for violations of the law of nations for at least a decade, and having gone to the trouble to implement the recommendations of

the 1781 resolution in the Judiciary Act and other legislation, suddenly had second thoughts and decided not to enact the further statute necessary to authorize suits. There is no support in the historical record for this proposition. Instead, as explained below, it is clear that Congress thought no further statute was necessary because torts in violation of the law of nations were cognizable at common law.

II. THE FIRST CONGRESS UNDERSTOOD THAT TORTS IN VIOLATION OF THE LAW OF NATIONS WERE COGNIZABLE AT COMMON LAW WITHOUT THE NEED FOR FURTHER ACTION BY CONGRESS.

Congress did not create a statutory right of action for torts in violation of the law of nations because it did not believe that any was necessary. Professor Bradley has explained:

> [T]here would have been no reason for the First Congress to create a federal statutory cause of action for torts in violation of the law of nations. The law of nations was considered at that time to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary.

Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 595 (2002).

A. THE LAW OF NATIONS WAS UNDERSTOOD TO BE PART OF THE COMMON LAW.

Blackstone had written that "the law of nations . . . is . . . adopted in it's [sic] full extent by the common law, and

is held to be a part of the law of the land." 4 BLACKSTONE, *supra*, at *67. In America, state and federal courts regularly applied the law of nations as common law in both criminal and civil cases. In convicting De Longchamps for the assault on Marbois by an indictment at common law, the Pennsylvania Supreme Court affirmed that "the law of Nations . . . , in its full extent, is part of the law of this State." *De Longchamps*, 1 U.S. (1 Dall.) at 116. During the 1790's, federal authorities also brought indictments at common law for violations of the law of nations. *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 842-45 (1989); Jay, *Origins*, *supra*. As Justice James Iredell stated when charging the grand jury in one of these prosecutions, "[t]he Common Law of England, from which our own is derived, fully recognizes the principles of the Law of Nations, and applies them in all cases falling under its jurisdiction, where the nature of the subject requires it." Charge to the Grand Jury of Justice James Iredell for the District of South Carolina (May 12, 1794), *quoted in* Jay, *Law of Nations*, *supra*, at 825.

The law of nations also applied as common law in civil cases. Blackstone reported, for example, that "in mercantile questions, such as bills of exchange and the like . . . the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to." 4 BLACKSTONE, *supra*, at *67. The same was true in America. In a comprehensive study of the subject, Professor Fletcher noted that "[a]ll American courts, state and federal, relied on the general law merchant in commercial cases." William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984); *see also* Curtis A.

Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 824 (1997) ("the law of nations . . . had the legal status of general common law").

As common law, the law of nations applied in both state and federal courts. Early American writers "generally asserted that the law of nations was part of the law of the new American states and their national government." Jay, *Law of Nations*, *supra*, at 825; *see also* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984) ("Early in our history, the question whether international law was state or federal law was not an issue: it was 'the common law.'"). Moreover, because it was part of the common law, the law of nations required no legislative enactment to be effective. As Attorney General Edmund Randolph noted in an early opinion, "[t]he law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land." 1 Op. Att'y Gen. 26, 27 (1792).

B. THE TEXT OF SECTION 9 MAKES CLEAR THAT NO FURTHER ACTION BY CONGRESS WAS NECESSARY.

The text of Section 9 confirms that no further action by Congress was necessary for suits to be brought under the ATS. First, there is the word "tort." Although "tort law was not a highly developed field" in the late eighteenth century, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 261 (1973), there is no escaping the fact that the First Congress deliberately used this word, which had a definite meaning. Blackstone used the word "tort" to describe actions "whereby a man claims a satisfaction in damages for some injury done to his person or property" such as

"actions for trespasses, nusances [sic], assaults, defamatory words, and the like." 3 WILLIAM BLACKSTONE, COMMENTARIES *117. Such actions required no statutory authorization, and the injured party might obtain a "remedy by suit or action in the courts of common law . . . ." 3 *id.* at *118; *see also* 3 *id.* at *123 ("wherever the common law gives a right or prohibits an injury, it also gives a remedy by action"). While Blackstone's discussion of offenses against the law of nations focused on criminal penalties, *see* 4 *id.* at *68-73, he understood that crimes and torts would sometimes overlap, noting that in cases of assault or battery, for example, "an indictment may be brought as well as an action; and frequently both are accordingly prosecuted: the one at the suit of the crown for the crime against the public; the other at the suit of the party injured, to make him a reparation in damages." 3 *id.* at *121. Pennsylvania indicted De Longchamps at common law for "an infraction of the law of nations," *De Longchamps*, 1 U.S. (1 Dall.) at 116, but Marbois could also have brought a common-law tort action against De Longchamps for assault. To deny Marbois that right unless a statute specifically authorized the action would have been to treat torts in violation of the law of nations *less favorably* than other torts, and it strains belief to suggest that this was the Framers' understanding.

Second, the district courts' jurisdiction under the ATS was expressly made "concurrent with the courts of the several States, or the circuit courts, as the case may be." 1 Stat. at 77. The provision for jurisdiction "concurrent with . . . the circuit courts" confirms that suits for torts in violation of the law of nations were cognizable at common law, because the concurrent jurisdiction of the circuit courts could only have been the jurisdiction granted in Section 11

of the Judiciary Act over "all suits of a civil nature *at common law* or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars." 1 Stat. at 78 (emphasis added). If Petitioner were correct that suits for torts in violation of the law of nations could only be brought under a federal statute and not at common law, then the circuit courts would have lacked jurisdiction over these cases under Section 11 and the ATS's reference to the concurrent jurisdiction of the circuit courts would be rendered meaningless. Finally, the fact that the district courts' jurisdiction under the ATS was to be "concurrent with the courts of the several States" belies Petitioner's assertion that suits for torts in violation of the law of nations could not be brought in state court. See Casto, *supra*, at 508-10.[10]

[10] Petitioner's argument that torts in violation of the law of nations could not be heard in state court rests heavily on the fact that the Continental Congress's 1781 resolution recommended that the States "authorise suits to be instituted for damages by the party injured" and that the 1782 Connecticut act did just that. Petitioner's Brief 21-23. From this, Petitioner infers that such suits could not otherwise have been brought. This inference is mistaken for three reasons. First, it ignores the fact that the law of nations was considered to be part of the common law. Second, it was not unusual for legislatures at that time to pass statutes that would limit, expand, or simply restate the law of nations. *See* Bradley, *supra*, at 595 ("The law of nations was considered at that time to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary."); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1280 (1996) ("In essence, the law of nations operated as a set of background rules that courts applied in the absence of any binding sovereign command to the contrary."). Indeed, Blackstone viewed the acts of parliament dealing with the law of nations simply as restatements of the law that would have applied even in their absence. *See* 4 BLACKSTONE, *supra*, at *67 ("those acts of parliament, which have from time to time been made to enforce

Third, a comparison of Section 9's alien tort provision with the other clauses of Section 9 indicates that no further congressional action was necessary before suits could be brought. Section 9 contains six clauses vesting jurisdiction in the district courts, of which the ATS is the fourth. The first three clauses contemplated that Congress might enact legislation under which a criminal prosecution or civil suit could be brought, but the last three did not. The first, second, and third clauses of Section 9 gave the district courts jurisdiction over: (1) "all crimes and offences that shall be cognizable under the authority of the United States . . . where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted;"[11] (2) "all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States . . . ;" and (3) "all seizures . . . and . . . all suits for penalties and forfeitures incurred, under the laws of the United States." 1 Stat. at 76-77. If Congress passed criminal legislation, "laws of

this universal law, or to facilitate the execution of it's [sic] decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom"). Third, both the 1781 resolution and 1782 Connecticut act did go beyond the existing common law, not by authorizing a suit for damages by the injured party but rather by authorizing an indemnity action by the United States if it chose to compensate the injured party out of the public treasury. *See* 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra*, at 1137; Acts and Laws of the State of Connecticut, in America, *supra*, at 83. The 1781 resolution and the Connecticut act were not superfluous, therefore, even though torts in violation of the law of nations were already cognizable in state courts at common law.

[11] In cases where the punishments exceeded those limits, jurisdiction was given to the circuit courts. 1 Stat. at 78-79.

impost, navigation or trade" providing for seizures, or other "laws of the United States" providing for penalties and forfeitures, these three clauses would provide the district courts with jurisdiction. It is worth noting, however, that at least with respect to the first two jurisdictional clauses further legislation was not necessary. Admiralty jurisdiction over prize cases and private disputes would exist without further congressional authorization, and it was assumed throughout the 1790's that the district courts would have jurisdiction over indictments at common law even in the absence of a federal criminal statute.[12]

The fourth, fifth, and sixth clauses of Section 9, on the other hand, gave the district courts jurisdiction over: (4) "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States;" (5) "all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars;" and (6) "all suits against consuls or vice-consuls . . ." 1 Stat. at 77. Importantly, in none of these clauses is there any mention of "laws of the United States," as one finds in Section 9's second and third clauses. The fifth clause clearly anticipates suits by the United States "at common law." So does the fourth, since the law of nations was understood to be part of the common law. *See*, *e.g.*, 4 BLACKSTONE, *supra*, at *67. And the

[12] As noted earlier, throughout the 1790's the United States continued to bring criminal indictments at common law, particularly for violations of the law of nations. *See* Jay, *Law of Nations*, *supra*, at 842-45; Jay, *Origins*, *supra*. Indeed, Ellsworth himself would instruct a grand jury that violations of the law of nations were punishable as common-law crimes. *See* Grand Jury Charge of Chief Justice Oliver Ellsworth, Circuit Court for the District of South Carolina (May 15, 1799), *reprinted in* Jay, *Origins*, *supra*, at 1114 app.

sixth, which was designed to protect foreign officials from being sued in state court, is broad enough to encompass suits at common law or pursuant to a statute.[13] Finally, it is worth noting that in the first three clauses, where Congress might have been expected to pass further legislation authorizing suits, the district courts' jurisdiction was exclusive of the state courts. By contrast, in the fourth and fifth clause, where suits were expected to be brought at common law, the district courts' jurisdiction was concurrent with that of the state courts.

Petitioner analogizes the ATS to the third clause of Section 9 providing for exclusive jurisdiction over "all suits for penalties and forfeitures incurred, under the laws of the United States." Petitioner's Brief 14. For Petitioner's analogy to work, however, the language of the ATS would have to provide jurisdiction over "all causes where an alien sues *under the laws of the United States* for a tort only in violation of the law of nations or a treaty of the United States." But the italicized language does not appear in the text that Congress passed. Surely the more apt analogy is to the fifth clause of Section 9 conferring jurisdiction over suits by the United States at common law, which like the ATS lacks the "under the laws of the United States" language and makes the district courts' jurisdiction concurrent with the courts of the several States.

In short, Petitioner's assertion that "[l]ike the other clauses of Section 9, the ATS granted district courts juris-

[13] Section 13 of the Judiciary Act further gave this Court original and exclusive jurisdiction over all suits against ambassadors, other public ministers, and their domestics and original but not exclusive jurisdiction over all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul was a party. 1 Stat. at 80-81. Again, this jurisdiction would have included suits at common law.

diction to hear causes of action that Congress created elsewhere," *id.* 12, is mistaken. Only the third clause of Section 9 required Congress separately to create a right to sue. The ATS, like each of the other clauses, did not.

C. CONTEMPORANEOUS INTERPRETATIONS OF THE ATS CONFIRM THAT NO FURTHER ACTION BY CONGRESS WAS NECESSARY TO AUTHORIZE SUIT.

Early interpretations of the ATS also show that aliens were presumed to have a remedy under the provision without the need for a further congressional enactment. In 1795, Attorney General William Bradford was asked to opine on the actions that might be taken against Americans who had helped the French attack the British colony of Sierra Leone. Bradford, who had been the Attorney General of Pennsylvania and chief prosecutor in the Marbois Affair, *see De Longchamps*, 1 U.S. (1 Dall.) at 113; Casto, *supra*, at 503 n.201, expressed some doubt whether the offenders could be criminally prosecuted in the courts of the United States. 1 Op. Att'y Gen. 57, 58-59 (1795). He continued:

> But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . .

Id. at 59. In Bradford's view, no additional statute was necessary to authorize the aliens' suit. All that was needed for those injured to have "a remedy by a *civil* suit in

the courts of the United States" was the ATS's grant of "jurisdiction."[14]

The ATS was also interpreted in two federal cases during the 1790's. In *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607), a French privateer captured as prize a Spanish vessel carrying slaves mortgaged to a British citizen. In port, the mortgagee's agent seized and sold the slaves, and the privateer sued for the proceeds. There was some doubt that the suit fell within the district court's admiralty jurisdiction because the seizure had been made on land but, the court continued,

> as the 9th section of the judiciary act of congress . . . gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point.

[14] Petitioner attempts to minimize the significance of this interpretation by arguing that "[a]t a time when the Washington Administration was stretching the common law past the breaking point to prosecute conduct that did not violate federal law . . . it is not surprising that the Attorney General would overstate the ATS's scope." Petitioner's Brief 38 n.13. In fact, Bradford's opinion was quite careful not to overstate the reach of federal criminal jurisdiction. He stated that "[s]o far . . . as the transactions complained of originated or took place in a foreign country, they are *not* within the cognizance of our courts." 1 Op. Att'y Gen. at 58 (emphasis added). He further discussed the possibility of an indictment for crimes committed on the high seas, but thought U.S. jurisdiction doubtful because of the limits of the federal criminal statute. *See id.* at 58-59 ("But some doubt rests on this point, in consequence of the terms in which the 'Act in addition to the act for the punishment of certain crimes against the United States' is expressed."). These are not the words of a person who was overstating the reach of U.S. jurisdiction.

Id. at 810. The *Bolchos* court did not even consider the possibility that the privateer's tort suit could not be brought because Congress had not passed a separate statute authorizing it. In *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895), a French privateer captured a British ship within the territorial waters of the United States, and the owners sought restitution of the ship and its cargo as well as damages for its detention. The district court stated in dictum that the suit could not be maintained under the ATS—not because Congress had failed to pass a separate statute authorizing the suit, but because "[i]t cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for." *Id.* at 948.

In sum, the language and structure of Section 9, as well as the contemporaneous interpretations of the ATS, confirm that no additional action by Congress was necessary to authorize alien tort suits. "In 1789, it was understood that the common law provided the right to sue for a tort in violation of the law of nations, just as it provided the right to sue for any other kind of tort." Dodge, *supra*, at 237-38.

III. THE FIRST CONGRESS INTENDED THE DISTRICT COURTS TO HAVE JURISDICTION OVER "ALL" CAUSES WHERE AN ALIEN SUES FOR A TORT ONLY IN VIOLATION OF THE LAW OF NATIONS.

Petitioner's *amici* suggest, in the alternative, that jurisdiction under the ATS should be limited to a subcategory of torts in violation of the law of nations. The United States suggests that this Court should apply the presumption against extraterritoriality and hold that the ATS reach-

es torts in violation of the law of nations only when they occur within the United States. *See* Brief for the United States as *Amicus Curiae* in Support of Petitioner 53-57. The Washington Legal Foundation suggests that this Court should limit the ATS to those torts that violated the law of nations in 1789. Brief of Washington Legal Foundation *et al.* as *Amici Curiae* in Support of Petitioner 9-13. The history and text of the ATS support neither interpretation.[15]

A. THE FIRST CONGRESS INTENDED THE ATS TO REACH TORTS IN VIOLATION OF THE LAW OF NATIONS THAT OCCURRED ABROAD.

The text of the ATS contains no geographical limitation, and "[t]he broad wording of the statute clearly encompasses torts without regard to the place of their commission." Casto, *supra*, at 503. This lack of geographical limitation

[15] *Amici* Professors of International Law, Federal Jurisdiction, and Foreign Relations Law briefly raise two other limiting constructions, neither of which is historically well-founded. First, they suggest that the ATS was meant to apply only to certain maritime torts. Brief for Professors of International Law *et al.* as *Amici Curiae* in Support of Petitioner 28. This suggestion, first made in Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995), distorts the text of the ATS and would have made it redundant because these same torts already fell within the district courts' admiralty jurisdiction. *See* Dodge, *supra*, at 243-56. Second, these *amici* suggest that the ATS was meant to apply only when the defendant was a U.S. citizen. Brief for Professors of International Law *et al.* as *Amici Curiae* in Support of Petitioner 28-29. This suggestion, made in Bradley, *supra*, would mean that cases like the Marbois Affair would be excluded from the scope of the ATS and is also inconsistent with the ATS's text and early interpretations. *See* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 691-701 (2002).

stands in sharp contrast to the first clause of Section 9, which gave the district courts jurisdiction over "all crimes and offences that shall be cognizable under the authority of the United States, *committed within their respective districts, or upon the high seas* . . . ." 1 Stat. at 76-77 (emphasis added). In the late-18th Century, tort actions were considered to be transitory and could be brought wherever the tortfeasor was found. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774) (Mansfield, C.J.). The established rule in criminal cases, by contrast, was that "[c]rimes are in their nature local, and the jurisdiction of crimes is local." *Rafael v. Verelst*, 96 Eng. Rep. 621, 622 (C.P. 1776) (De Grey, C.J.). Oliver Ellsworth had applied the doctrine of transitory torts as a judge in Connecticut, *see Stoddard v. Bird*, 1 Kirby 65, 68 (Conn. 1786) (Ellsworth, J.) ("Right of action [for a tort] against an administrator is transitory, and the action may be brought wherever he is found."), and the text of the ATS simply reflects his understanding that the district courts would have jurisdiction over torts in violation of the law of nations regardless of where those torts occurred.

Attorney General Bradford's 1795 opinion confirms that suits for torts in violation of the law of nations that occurred abroad could be brought in district court under the ATS. As was discussed above, Bradford was asked what actions might be taken against Americans who had helped the French attack the British colony of Sierra Leone. Reflecting the common understanding of criminal jurisdiction, he first noted that "[s]o far . . . as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States." 1 Op. Att'y Gen. at 58. But

Bradford proceeded to contrast the jurisdiction of United States courts over tort actions, stating that "there can be no doubt" that the injured aliens "have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States." *Id.* at 59.

Bradford clearly did not think that the presumption against extraterritoriality limited the district courts' jurisdiction under the ATS, although this presumption was well established at the time. *See, e.g., Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818); *The Apollon*, 22 U.S. (9 Wheat.) 362, 370-71 (1824). The simple explanation is that the ATS did not provide for the extraterritorial application of United States law. Instead, it provided jurisdiction to adjudicate disputes under a law that was already binding everywhere in the world—the law of nations. A district court hearing a suit based on a tort in violation of the law of nations that occurred in Sierra Leone would not be prescribing rules of conduct for parties in a foreign country but would rather be enforcing rules of law that were as binding in Sierra Leone as they were in the United States.[16] It was

[16] In modern terms, the United States' argument based on the presumption against extraterritoriality makes the mistake of confusing jurisdiction to adjudicate with jurisdiction to prescribe. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1986) (distinguishing jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce). The European Commission's argument that jurisdiction under the ATS should be defined by reference to customary international law limits on jurisdiction to prescribe rests on the same misunderstanding. *See* Brief of *Amicus Curiae* the European Commission in Support of Neither Party 12-26.

not at all unusual for courts at that time to hear cases that arose abroad. Alexander Hamilton noted:

> The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts.

THE FEDERALIST NO. 82, at 491, 493 (A. Hamilton) (C. Rossiter ed., 1961); *see also* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra*, at 556 (J. Marshall) ("If a man contracted a debt in the East Indies, and it was sued for here, the decision must be consonant to the laws of that country."). In 1789, as today, U.S. courts would decide cases that arose abroad without any suggestion that they were exercising an impermissible, "extraterritorial" jurisdiction.

B. THE FIRST CONGRESS EXPECTED THE LAW OF NATIONS TO EVOLVE.

The argument that jurisdiction under the ATS should be limited to those torts in violation of the law of nations that were recognized in 1789 is also contrary to the First Congress's understanding. Statesmen of that era understood that the law of nations had evolved and would continue to do so. In discussing the rights of neutral traders, Secretary of State Thomas Jefferson referred to "the principles of that law [of nations] as they have been liberalized in latter times by the refinement of manners & morals, and evidenced by the Declarations, Stipulations, and Practice of

every civilized Nation." Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793), *in* 7 THE WORKS OF THOMAS JEFFERSON 312, 314 (P.L. Ford ed., 1904). Justice Wilson similarly declared in *Ware v. Hilton*, 3 U.S. (3 Dall.) 199 (1796), that "[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Id.* at 281 (Wilson, J., concurring); *see also* Proclamation of Neutrality (Apr. 22, 1793), *in* 32 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 430-31 (J.C. Fitzpatrick ed., 1939) (referring to "the modern usage of nations"); Charge to the Grand Jury of Justice James Iredell for the District of South Carolina (May 12, 1794), *quoted in* Jay, *Law of Nations*, *supra*, at 824 (noting that the law of nations had been expounded "with a spirit of freedom and enlarged liberality of mind entirely suited to the high improvements the present age has made in all kinds of political reasoning"). Justice Story captured the late-18th Century understanding of the law of nations when he wrote: "It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations." *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551), *overruled on other grounds*, *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

If the First Congress had wanted to limit the district courts' jurisdiction under the ATS to existing violations of the law of nations, it could have enumerated them just as Blackstone had. 4 BLACKSTONE, *supra*, at *68. When the Continental Congress made its recommendation to the States in 1781, it did list several violations of the law of

nations but took care not to make the list exclusive, specifically recommending that each State appoint a tribunal "to decide on offences against the law of nations, not contained in the foregoing enumeration." 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra*, at 1137. It was in this same spirit, and with the understanding that the law of nations had evolved and would continue to do so, that the First Congress expressly provided that the district courts were to have jurisdiction over "*all* causes where an alien sues for a tort only in violation of the law of nations." 1 Stat. at 77 (emphasis added).

CONCLUSION

The history and text of the ATS establish that no further congressional authorization is necessary for aliens to bring suit and that jurisdiction under the ATS extends to "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."

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(29)

No. 03-339

FEB 27 2004

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* ALIEN FRIENDS REPRESENTING HUNGARIAN JEWS AND BOUGAINVILLEANS INTERESTS IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE* [1]

The Hungarian Jews, as denominated herein, are the plaintiffs in *Rosner v. United Sates*, Case No. 01-1859-CIV-SEITZ, pending in U.S. District Court in the Southern District of Florida and reported at 231 F. Supp. 2d 1202. They include aliens who allege that their personal possessions and family heirlooms were accepted into protective custody by the United States Army in occupied Austria in 1945 after World War II had ended, but the U.S. never returned their property to them or paid compensation for their property. Among other things, the Hungarian Jews have a claim against the United States under the Alien Tort Statute or Alien Tort Claims Act, 28 U.S.C. § 1350 (hereinafter "ATCA").

The Bougainvilleans, as denominated herein, are the plaintiffs in *Sarei v. Rio Tinto*, Case No. 00-11695-MMM, reported at 221 F. Supp. 2d 1116 (C.D. Cal.), which is pending in the Ninth Circuit Court of Appeals. The Bougainvilleans, one of whom is a Californian, are involved in an ATCA case and have asserted claims of genocide, war crimes, and crimes against humanity, among other things, against Rio Tinto, a private corporation.

Amici's interest in this case stems from the unwarranted effort of the Executive Branch and many multinational commercial interests to undo the traditional understanding that aliens are entitled to assert tort claims in the federal courts for violations of the law of nations. *Amici* have also filed a brief in the consolidated proceeding *Rasul v. Bush*, Nos. 03-334 & 03-343, pending before this Court which includes a discussion of some issues that are relevant – albeit indirectly – to the considerations here.

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1. Pursuant to Supreme Court Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *Amici* and their counsel, contributed monetarily to the preparation and submission of this brief. The written consents of the parties to the filing of this brief have been filed with the Clerk.

I. Summary of Argument

The issue is whether provisions of the First Judiciary Act of 1789, now codified at 28 U.S.C. § 1350, which state that federal courts are empowered to hear "any civil action [brought] by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," means that aliens may bring legal claims in the federal courts for a decision on the merits provided that their injuries are caused by an alleged "violation of the law of nations" or U.S. treaty. From the express words of the statute, it is clear that resolution of this issue is not about whether and when an individual may enforce his or her federal statutory or constitutional right in a federal court. Instead, this case is about whether and under what circumstances Congress has given its approval for aliens to bring civil claims in federal courts against another party for violating the law of nations to obtain a judgment or vindicate the private rights that are recognized under customary international law.

Amici submit that the answer to this issue is the same answer that every lower federal court has adopted, including the *en banc* panel of the Ninth Circuit Court of Appeals here, namely that Congress intended the federal courts to hear and decide all tort claims alleged to be committed in violation of the law of nations. As explained below, this position is amply supported by the Framers' understanding of the law of nations, the role of the courts in adjudicating individual private rights, the opinions of the political branches, and this Court's holdings and other judicial decisions.

II. The Alien Tort Statute Provides The Federal Courts With The Authority To Adjudicate All Claims Asserted By Aliens Alleging A Violation Of The Law Of Nations

The Alien Tort Statute or Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"), provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. Originally, Congress, in the Judiciary Act of 1789, Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789), enacted

ATCA's predecessor statute, which provided:

> The district courts shall . . . have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820). Although the ATCA has undergone other modifications, these two provisions are the entire text of the statute at issue.

A. No Court Has Ever Required Additional Congressional Action Before Adjudicating Tort Claims Brought by Aliens Alleging a Violation of the Law of Nations

For over 200 years, based on the above statutory text, every court of this country has permitted aliens to bring tort claims for violations of the law of nations without any additional Congressional legislation. Indeed, Justice Story, writing for this Court, apparently rejected the argument that more was needed from Congress before adjudicating claims brought under the law of nations. *United States v. Smith*, 18 U.S. (5 Wheat.) at 157-59. Moreover, every Circuit Court of Appeals that has addressed the question of whether more is required from Congress before an alien may bring such claims to the courts of the United States has uniformly rejected all arguments, including those presented by Petitioner, that asked the federal courts to require more from Congress, including creating an express cause of action for the particular right allegedly already protected by the law of nations, before permitting international tort law claims to be adjudicated in the federal courts.[2] *Amici* can find only two circuit judges'

2. *E.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-06 (2d Cir. 2000); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-88 (2d Cir. 1980); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 503 (9th Cir. 1992); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996). There are a host of district court opinions that have also rejected the argument that more is required from Congress before an alien may assert a tort claim for violations of the law of nations. *E.g.*, *Xuncax v. Gramajo*, 886

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opinions, writing for themselves, who have accepted the argument that more is required. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring); *Al-Odah v. U.S.*, 321 F.3d 1134, 1145 (D.C. Cir. 2003) (Randolph, J., concurring).

Simply stated, there is no federal court decision that *Amici* has located that has accepted Petitioner's argument that Congress must create a separate express cause of action for suits brought under the ATCA. To require more from Congress now, in the face of such a uniform body law, would reverse Congress's understanding of the law interpreting ATCA, including the understanding that Congress had when it recently enacted the Torture Victim Protection Act ("TVPA"). Nevertheless, this is what Petitioner asks, contending that some additional Act of Congress is required before an alien may assert a tort claim to enforce rights guaranteed under the law of nations. Petitioner's position is belied not only by the uniform body of law that exists now, but also by the historic understanding of the law of nations and the Framers' and Congress's intent in enacting the ACTA.

B. History, Common Law Practices, and the Framers' Understanding all Confirm that the ATCA was Intended to Provide Aliens with a Federal Forum to Enforce Rights Recognized by the "Law of Nations"

According to the Court, a "cause of action" is what entitles a litigant to "invoke the power of the court" in order "to enforce the right at issue." *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). Unless courts are to revert and return to code pleading or find jurisdiction and laws rigidly guided solely by statutory actions similar to civilian code jurisdictions rather than our traditional common law, this means that whether the litigant can obtain the relief sought depends on the legal right asserted, which can "mean one thing for one purpose and something different for another." *Id.* at 237-39.

(Cont'd)

F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987).

In the context of ATCA cases, the focus of this inquiry is not who may enforce a federal statutory right, instead the focus of the Court's inquiry is the rights of litigants under the "law of nations." There are different criteria for determining whether a cause of action is enforceable in the federal courts. For example, "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Davis*, 442 U.S. at 241 (emphasis in original). Just as it is a fundamentally different kind of analysis as to who may enforce a right protected by the Constitution than who may enforce a statutory right, it is equally different who may enforce a right protected by the "law of nations" as opposed to a statutory right. These rights are simply of a different kind.[3] Furthermore, because of the existing jurisprudence under ATCA and Congress's subsequent action in enacting the TVPA, this Court has explained its inquiry here is limited to "whether Congress intended to preserve the pre-existing remedy." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982).

Through America joining the ranks of nations of the world and ATCA, Congress delegated to the federal courts the authority to determine when the law of nations provides a right that is enforceable in the federal courts, just as though the federal courts were a court of general jurisdiction deciding an ordinary tort claim of negligence. As explained by the Eleventh Circuit, the "[ATCA] establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira*, 72 F.3d at 848. Of course, this does not mean that Congress cannot take that power away from the federal judiciary, or further refine it or elaborate on it, as it has in the TVPA. But, what it does mean is that in the absence of any additional Congressional action, whether a litigant asserts a right that is enforceable under the law of nations is, by virtue of the ATCA and federal common law, for the federal courts to determine.

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3. Though there are other reasons articulated in Respondent's brief, this fact alone distinguishes this case from *Sandoval* and other cases decided by this Court where the litigant sought to enforce a ***statutory*** right.

1. The law of nations

Professor Louis Henkin aptly summarizes the status of the law of nations when he writes:

> International law is not merely law binding on the United States internationally but is also incorporated into United States law. It is "self-executing" and is applied by courts in the United States without any need for it to be enacted or implemented by Congress. Since it is law not enacted by Congress, and the principles of that law are determined by judges for application in cases before them, customary international law has often been characterized as "federal common law" and has been lumped with authentic federal common law – the law made by federal judges under their constitutional power or under authority delegated by Congress.

Louis Henkin, *International Law: International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984). The notion that the law of nations is like the general common law was well accepted and understood by the Framers and this Court's precedent. Indeed, this Court explained that courts ascertain what the law of nations is or requires "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) at 160-61. What the Framers generally referred to as the "law of nations" is now more commonly called international law.[4] Today, the "law of nations" is comprised of two legal concepts: customary international law and a subset of customary international law, called *jus cogens*. A *jus cogens* norm is one "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Siderman de Blake v. Republic of Argentina*,

4. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 41 (Introductory Note to pt. I, ch. 2) (1987).

965 F.2d 699, 714 (9th Cir. 1992). Accordingly, *jus cogens* norms "enjoy the highest status within international law." *Id.* at 715.

2. The Framers understood intended that the rights of individuals secured under the law of nations would be enforceable in the federal courts

In the seminal decision of *The Paquette Habana*, this Court explained:

> ***International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination***. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis added). And, based exclusively upon the law of nations and ATCA's predecessor statute, this Court not only found a legal cause stated when the U.S. naval forces seized Spanish fishing vessels during the Spanish-American War, it ordered the United States government to pay damages to aliens for a violation of the law of nations.

The decision in *The Paquette Habana* is consistent with and indicative of the Framers' understanding of the law of nations and the role of the federal courts in construing international common law cases brought by aliens. As Professor Stewart Jay has documented in *The Status of the Law of Nations in Early American Law*, the Framers viewed the law of nations as part of the common law of every civilized society, and which became part of America's common law upon America becoming a nation. 42 VAND. L. REV. 819, 823-28 (1989); *see also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) ("[T]he United States had, by taking a place among the nations of the earth, become amenable to the laws of nations. . . .") Indeed, in 1815, Chief Justice Marshall declared that "the Court is bound by the law of nations which is a part of the law of the land." *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

The reason the law of nations became part of "the law of the land" was, in essence, to help keep America at peace in the world, which was a fundamental part of the design in enacting the legislation. *See generally* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 A.J.I.L. 461 (1989). Perhaps the most influential international law writer to the Framers was Emmerich de Vattel. This Court has referred to him as an authoritative source of what the law of nations meant at the time.[5] In 3 E. de Vattel, THE LAW OF NATIONS, bk. II, ch. XVIII, § 350, at 230-31 (Carnegie ed. trans. Fenwick 1916) (1758 ed.), Vattel referred specifically to the "denial of justice" to aliens in foreign lands as a justification for wars of reprisal launched by the alien's home nation. Accordingly, Alexander Hamilton wrote in THE FEDERALIST No. 80:

> As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, ***it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned***.

THE FEDERALIST No. 80 (A. Hamilton) (emphasis added). Thus, the Constitutional Convention unanimously resolved "[t]hat the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony." 2 M. Farrand, THE RECORDS OF THE CONSTITUTIONAL CONVENTION 39 (1911). And, John Jay, writing in THE FEDERALIST No. 3, extolled "[t]he wisdom of the Convention" for committing questions concerning "treaties and articles of treaties, as well as the laws of nations," to the federal courts.

Consequently, the federal courts assist in keeping this country at peace by enforcing the law of nations, whenever the law of nations controls the legal question presented. As federal common law, the law is, like other common laws, found by consulting "the works of jurists" across the globe. This is not "divining" in an anti-democratic manner what the law is;

5. *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978).

as a common law process, it is "trustworthy evidence of what the law really is." *The Paquette Habana*, 175 U.S. at 700. The law of nations also protects the rights of individuals; it was not simply the law governing nation-to-nation conduct. 4 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 66-71 (American ed., Worcester, Mass. 1790). Consequently, even contemporary academics who oppose *Amici*'s position here admit "there would have been no reason for the First Congress to create a federal statutory cause of action for torts in violation of the law of nations. The law of nations was considered at the time to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary." Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 595 (2002).

From the beginning of this nation, both state and federal courts have treated international law as incorporated into American law and applied it to cases without anything more to guide them than the original ATCA. *See* Henkin, *supra*, 82 MICH. L. REV. at 1557. Indeed, even before *The Paquette Habana*, this Court explained:

> International law . . . [is] governed by what has been appropriately called the law of nations; . . . [and includes] questions arising under what is usually called ***private international law*** . . . and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation – ***is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination***.

Hilton v. Guyot, 159 U.S. 113, 163 (1895) (emphasis added). And though this Court recognized that statutes and/or treaties provide courts with the "most certain guide . . . for the decision of such questions," when "there is no written law upon the subject . . . ***the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is***, whenever it becomes necessary to do so, in order ***to determine the rights***

of parties to suits regularly brought before them. *Id.* (emphasis added). Indeed, it is "emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803), and "decide on the rights of individuals." *Id.* at 170. And, the law of nations, at least as applied to individuals asserting their substantive rights, remains an area in which no affirmative legislative act is required to "authorize" its application in U.S. courts. Henkin, *supra*, 82 MICH. L. REV. AT 1561 ("International law is . . . 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.") Thus, it is the duty of federal courts to find and ascertain the rights of the parties under the law of nations and decide those cases and controversies presented.[6] The only way to make sense of this history is to reject Petitioner's assertion that something more is needed from Congress.

This historic understanding of the ATCA is confirmed in an opinion of former Attorney General William Bradford, published in 1795, addressing a situation where American citizens trading off Sierra Leone allegedly joined a French fleet in attacking and plundering British property during the then ongoing Franco-British war:

> [T]here can be no doubt that the company or individuals who have been injured by these acts of

6. *See also Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815)

> The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states. . . . This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

> hostility have a ***remedy*** by a ***civil*** suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.

Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (July 6, 1795) (emphasis on remedy supplied). The injured aliens to which Attorney General Bradford refers had no explicit statutory right to sue in tort other than the ATCA, but Attorney General Bradford nonetheless concluded that the aliens' injury in violation of the law of nations would be actionable in federal district court. There is no hint in the opinion that Congress needed to provide additional legislation to implement ATCA or make claims alleging a violation of the law of nations actionable. Indeed, in *Bolchos v. Darrel*, 3 Fed. Cas. 810 (D. S. Car. 1795), one contemporaneous federal court confirmed General Bradford's position. Petitioner's position that something more is needed from Congress is erroneous.

3. Construing and enforcing rights under the law of nations is a task assigned to the federal courts absent explicit statutory directive to the contrary

Today, law of nations style tort suits are regarded as a matter of federal common law. Although this Court has at times pronounced the federal common law dead, this Court in 1981, unanimously recognized "the need and authority in some limited areas to formulate what has come to be known as 'federal common law.' . . . These instances are 'few and restricted,' . . . [but include] those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' . . . including international disputes implicating . . . our foreign relations." *Texas Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) (citations omitted); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 508 n.4 (1988) (same). Even before 1981, the job of construing international law occupied "an existence in the federal courts independent of acts of Congress." *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980).

Most legal commentators point to the Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), as the seminal decision, at least post-*Erie*, that concluded that

international law, as incorporated into U.S. domestic law, is federal common law rather than state common law, and that it is binding as a rule of decision on applicable statutes such as ATCA. *E.g.*, Henken, *supra*, 82 MICH. L. REV. AT 1560-61. Accordingly, because what is at issue here is federal common law, the content and substance of the law is prescribed by the courts, at least "absent explicit statutory directive otherwise." *Boyle*, 487 U.S. at 504. This understanding of the law of nations has been broadly applied and is well accepted in judicial decisions today.

> Applying this authority in *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, Justice O'Connor found "the principles governing this case are common to both international law and federal common law." Similarly, in a string of decisions determining the legal status of submerged offshore areas, the Court has applied customary international law rules to guide its interpretation of federal statutory and treaty provisions. Moreover, both the Supreme Court and the lower federal courts have regularly looked to customary international law rules when applying the felicitously named "*Charming Betsy*" principle, a canon of statutory construction that directs that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." Finally, in addition to their numerous rulings under the Alien Tort Claims Act (ATCA), lower federal courts have determined customary international rules to be federal common law with regard to such diverse matters as expropriation, treaty interpretation, extradition, official immunity, and treatment of prisoners and detainees.

Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1836-38 (1998) (citations omitted).

Here, however, the Court is not operating in an area of Congressional silence. To the contrary, Congress has ratified *Filartiga* and confirmed that the ATCA, standing alone, permits

aliens to sue for violations of the law of nations. Moreover, to the extent the Executive Branch's opinion is relevant to the Court's interpretation of Congressional intent or its ratification – a legal proposition that *Amici* doubt – the Executive Branch has also endorsed *Filartiga*'s approach.

4. By enacting the TVPA, Congress codified the holding of *Filartiga* and confirmed that ATCA provides aliens with a federal judicial forum to enforce federal common law rights found embodied in the law of nations

For over 200 years, the ATCA (and its predecessor statute) has been applied consistently with the interpretation that it establishes federal jurisdiction and a cause of action for serious violations of international law, including several cases in the last quarter century brought for particularly egregious violations of well-defined individual human rights, such as war crimes, genocide, and crimes against humanity. The seminal decision of the modern ATCA era is *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, the Second Circuit held that two Paraguayans could bring an ATCA claim against a former Paraguayan police inspector for the torture and death of one of their family members. In so doing, the court confirmed its power to adjudicate human rights abuse claims committed abroad, holding that ATCA, "as part of an articulated scheme of federal control over external affairs," provides for "jurisdiction over suits by aliens where principles of international law are it issue. The constitutional basis for the [ATCA] is the law of nations, which has always been part of the federal common law." *Id.* at 885. And, as has been well documented, "[a]dherents to *Filartiga*'s legal principles included other federal courts, the Executive Branch, the American Law Institute, and the American Bar Association. In the legal academy, *Filartiga* met with a similarly warm reception. A body of scholarship emerged approving of *Filartiga*'s modern application of the ATCA." Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 466 (1997) (citations omitted).

Throughout the next several years before Congress enacted the TVPA, *Filartiga* was adopted and followed by every court that considered these issues, except *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). Shortly after *Tel-Oren* expressed reticence toward adopting and embracing *Filartiga*, Congress responded by enacting the TVPA. Congress notes that the TVPA was prompted, in large measure, by Judge Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), and his failure to follow *Filartiga*.[7] In particular, Senator Specter, the TVPA's main sponsor, explained that although he viewed the TVPA as largely superfluous, it was needed to correct any possibility that other courts might adopt Judge Bork's reasoning or otherwise come to understand that Congress was not explicitly approving of *Filartiga*, stating: "One might think . . . it would be unnecessary to have legislation on such a subject, because torture is such a heinous offense, such a heinous crime, that the courts would have jurisdiction without a formal legislative measure. This is necessary because of litigated cases in the field, most particularly [*Tel-Oren*]."[8] In particular, Judge Bork took issue with the Second Circuit's assumption in *Filartiga* that the ATCA both granted jurisdiction and created a cause of action, stating: "[I]t is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal." 726 F.2d at 801.

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7. *See* H.R. Rep. No. 367, 102d Cong., 2d Sess. 3, *reprinted in* 1992 U.S.C.C.A.N. 84.

8. These were Senator Specter's first words by way of introduction of the bill to the 102nd Congress. 137 Cong. Rec. S1378 (daily ed. Jan. 31, 1991). *See, e.g.*, Torture Victim Protection Act of 1989, Hearings Before the Subcomm. on Immigration & Refugee Affairs of the Senate Comm. on the Judiciary, 101st Cong. 36 (1990) [hereinafter "Senate TVPA Hearings"], at 36 (describing TVPA as "simply an extension and 'clarification'" of *Filartiga*); Senate TVPA Hearings, *supra*, at 65 (Statement of Sen. Specter) ("Well, that is why the legislation is really brought. The *Tel-Oren* case . . . and this bill will lay it all to rest."); H.R. Rep. No. 367, 102d Cong., 2d Sess. 3, *reprinted in* 1992 U.S.C.C.A.N. 84, 86-87 [hereinafter "House Report"]; *see also* Rachael E. Schwartz, *"And Tommorrow?" The Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMP. L. 271, 284 (1994) ("[W]hile giving Judge Bork the expression of legislative intent upon which he had insisted, Congress also admonished him that he was wrong to require it in the first place.")

In enacting the TVPA, however, Congress disagreed with Judge Bork and explained very clearly its understanding of the ATCA, endorsed and lauded the *Filartiga* line of cases, and enacted the legislation to sustain, rather than curtail, judicial enforcement of individual rights under law of nations. Indeed, given the well-established principles and pre-existing common-law adjudications under ATCA, the Court should reject a different interpretation of the ATCA absent Congressional action to the contrary. *Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Moreover, and contrary to Petitioner's and the corporate *amici*'s contentions, the TVPA does not function as a limit on the ATCA but, instead, as a subsequent statement of federal policy, it serves to illuminate the Framers' intent, Congress's intent and understanding, and controls the construction of the earlier enacted statute. *Food and Drug Administration v. Brown & Wilkinson*, 529 U.S. 120, 140-141 (2000); *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998). Under *Filartiga*, the ATCA permits aliens to bring tort claims alleging violations of the law of nations to the federal courts. And, as noted above, "[w]hen Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts," the Court's inquiry is limited to "whether Congress intended to preserve the pre-existing remedy." *Curran*, 456 U.S. at 378-79.

The legislative history of the TVPA irrefutably proves that Congress did more than intend to preserve the pre-existing remedy. For example, the House Report for the TVPA begins:

> The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, [the ATCA]. Section 1350 has other important uses and should not be replaced.

House Report, at 3. Indeed, Representative Yatron, the principal sponsor of the House Bill and Chair of the subcommittee, began the House hearings by explaining:

> ***International human rights violators visiting or residing in the United States have formerly been held liable to money damages under the Alien Tort***

> ***Claims Act. It is not the intent of the Congress to weaken this law, but to strengthen and clarify it.*** Federal courts should not allow congressional actions with respect to this legislation to prejudice positive developments, but rather to act upon existing law when ruling on the cases presently before them.

The Torture Victim Protection Act: Hearing on H.R. 1417 Before the Subcomm. on Human Rights and International Organizations of the Comm. on Foreign Affairs, 100 Cong., 2d Sess. 1 (1988) (statement of Rep. Yatron) (emphasis added). The House Report concluded:

> Claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. ***That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law***. [emphasis added]

Similarly, the Senate considered ATCA claims part of the federal common law, and also interpreted ATCA as providing for a federal common law basis to enforce rights under the law of nations and provide a remedy to aliens in the appropriate cases explaining:

> While the legislation specifically provides Federal districts [sic] courts with jurisdiction over these suits, it does not preclude state courts from exercising their general jurisdiction to adjudicate the same type of cases. As a practical matter, however, state courts are not likely to be inclined or well-suited to consider these cases. International human rights cases predictably raise legal issues – such as interpretations of international law – that are matters of Federal common law and within the particular expertise of Federal courts.

S. Rep. No. 102-249, at n.6 (1991). Indeed, as far as the Senate was concerned, the TVPA clarified what was already there and expanded ATCA claims to U.S. citizens. *See* 137 Cong. Rec. S1378 (daily ed. Jan. 31, 1991) (statement of Sen. Specter) ("This bill closes a gap in the law. Under court decisions, aliens have the right to sue their torturers under the Alien Tort Claims Act, but not U.S. citizens. This bill would extend protection to U.S. citizens while retaining the current law's protection of aliens."); *see also* 135 Cong. Rec. 22716 (1989) (statement of Sen. Leach) (describing the clarifying intent of TVPA to ensure continuation of ATCA's judicial successes).

Not surprisingly, every Circuit Court of Appeals that has examined the impact of the TVPA on the ATCA has reached the same conclusion: the TVPA codified the holding in *Filartiga*. *E.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n.10 (2d Cir. 2000) ("[T]he text of the [ATCA] seems to reach claims for international human rights abuses occurring abroad. We reached the conclusion that such claims are properly brought under the Act in *Filartiga* . . . ; Congress ratified our conclusion by passing the Torture Victim Protection Act"); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) ("In enacting the TVPA, Congress endorsed the *Filartiga* line of cases: The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed in 'violation of the law of nations'"); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) ("Congress enacted the Torture Victim Act to codify the cause of action recognized by this Circuit in *Filartiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens"); *Hilao*, 25 F.3d at 1475 ("Our reading of the plain text of § 1350 is confirmed by the Torture Victim Protection Act of 1991, codified at this section" (citation omitted)).[9]

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9. *See also Sarei*, 221 F. Supp. 2d at 1133 n.96 ("The TVPA codified the *Filartiga* decision"); *Beanal v. Freeport-McMoran*, 969 F. Supp. 362, 380 (E.D. La. 1997) ("The legislative history of the TVPA and recent case law stand for the . . . proposition that the TVPA codifies and expands the remedies available under § 1350"); *Barrueto v. Larios*, 205 F. Supp. 2d 1325, (Cont'd)

Congress through enacting the TVPA, "in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, ***expresses a policy favoring*** receptivity by our courts to such suits" and has "communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business."
Wiwa, 226 F.3d at 105-106 (emphasis added). Given the passage of time, judicial interpretation, and Congress's express acquiescence and adoption of *Filartiga*, there is no doubt that aliens have the right to relief for ATCA claims. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988).

5. The Executive Branch has also endorsed *Filartiga*

Congress's express policy of favoring federal courts receptivity to ATCA claims is shared by the Executive. Indeed, upon signing the TVPA into law, President Bush specifically endorsed U.S. receptivity to such tort actions. *See* Statement of President Bush upon signing HR 2092 (TVPA) 28 Weekly Comp. Pres. Doc. 465, 466 (Mar. 16, 1992). This was not the first time that the Executive expressed its approval for *Filartiga* or for permitting aliens to assert such claims under ATCA. Historically – indeed before the TVPA was ever enacted – the State Department strongly supported prudent adjudication of human rights claims brought in United States courts under the ATCA. In *Filartiga*, the Justice and State Departments together explained:

> Such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance. Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government.

(Cont'd)
1333 (S.D. Fla. 2002) (explaining through the TVPA and ATCA, Congress "clearly indicated its intent to provide federal courts as a forum to bring to justice individuals who contribute directly to human rights abuses").

Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 603 (1980) (citations omitted) [hereafter U.S. Memorandum in *Filartiga*]. The Legal Adviser of the State Department went further:

> The . . . international law of human rights . . . endows individuals with the right to invoke international law, in a competent forum and under appropriate circumstances. . . . ***As a result, in nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain cases directly enforceable in domestic courts.***

Id. at 602-03. (emphasis added).

The express ratification of *Filartiga* by Congress and the Executive's endorsement of the same should be the end of the matter here. Indeed, in the area of federal common law rights, judicial interpretation and enforcement of such rights are necessary to the smooth functioning of the federal government and here, both political branches approve of *Filartiga*. Further, this Court has steadfastly adhered to the proposition that it may infer Congress's consent from its knowledge of and acquiescence in lawmaking by federal judges. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981).[10] If Congress wished to, it could have changed the law as found by *Filartiga* or after any one of the numerous international law cases adjudicated under ATCA. However, to date, Congress has not indicated any desire to do so. To the contrary, Congress has expressly ratified the decision in *Filartiga* that provides a judicial forum to enforce the substantive rights under the law of nations and provides a remedy in the appropriate case. To the extent that any court might now reject such ratification and delegation by the political branch constitutionally entrusted to make such determinations, it does so in disregard of Congressional will and the Framers' design who gave the federal courts this

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10. *See also id.* (noting federal common law applies "in the absence of an applicable Act of Congress," and is no longer needed "when Congress addresses a question previously governed by a decision [that] rested on federal common law").

authority in part to help protect this country from legitimate acts of warfare.

Consider for a moment what might have happened if a sizeable number of British subjects were brutally murdered, tortured, or otherwise subjected to violations of the law of nations in the early history of this country and yet ATCA did not provide these aliens or their legal representatives with a legal avenue to redress such wrongs. The Framers believed war might ensue, as Vattel referred specifically to the "denial of justice" to aliens in foreign lands as a justification for wars of reprisal launched by the alien's home nation. In response to such concerns, Alexander Hamilton wrote in THE FEDERALIST No. 80. "it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."

> As so often happens, the hornbook rule - international law, as applied in the United States, must be federal law - makes obvious sense. Every schoolchild knows that the failures of the Articles of Confederation led to the framing of the Constitution, which established national governmental institutions to articulate uniform positions on such uniquely federal matters as foreign affairs and international law. Even as the new Constitution withheld foreign affairs powers from the states, it authorized a national institution, Congress, "to define and punish . . . Offences against the Law of Nations." But Congress's authority to construe the law of nations was never exclusive. The early Supreme Court spent much of its time deciding cases under the law of nations. International law came to occupy "an existence in the federal courts independent of acts of Congress." By 1981, the Supreme Court had come unanimously to "recognize the need and authority in some limited areas to formulate what has come to be known as 'federal common law'" in cases in which "a federal rule of decision is 'necessary to protect uniquely federal interests,'" including "international disputes implicating . . . our relations with foreign nations."

Koh, *supra*, 111 HARV. L. REV. at 1825-26 (citations omitted). In addition to overturning hornbook law, the effect of accepting Petitioner's arguments would leave the law of nations determinations to state court, which would mean that international law is not federal law at all, in which case the federal courts could not authoritatively pronounce what it is. Such an absurd result is contrary to *Sabbitino*, 376 U.S. at 425, and would return this country to the intolerable days of the Articles of Confederation.

III. ATCA Litigation Does Not Unduly Interfere With Foreign Affairs Or Commerce

Despite Congress's ratification and approval of *Filartiga* which allows aliens to assert international law claims in U.S. courts, under ATCA and the Executive's frequent endorsement of the same, certain *amici* contend or suggest that ATCA is solely jurisdictional and that the *Filartiga* line of cases, including the *en banc* decision of the Court of Appeals at issue here, is fundamentally flawed. *Amici* will devote the remaining sections of this brief to rebutting several of the policy arguments common to the business and corporate *amicus* briefs submitted.

A. Economic Impacts and Potential Impacts on Foreign Relations Are Improper Considerations

Regardless of the veracity of the contention that ATCA litigation "wreaks economic damage and undermines the nation's foreign policies," accepting such policy arguments as a reason to find (or not find) that the federal courts are the appropriate forum for aliens to enforce their substantive international law rights is improper. Indeed, these concerns, though appropriate considerations for the political branches, do not and cannot guide the Court in determining whether a cause or claim exists or whether a claim may be brought under the law of nations; they are political issues that only the political branches are constitutionally empowered to weigh and respond to. *Patrickson v. Dole Food Co.*, 251 F.3d 795, 804 (9th Cir. 2001), *aff'd on unrelated issue*, 538 U.S. 468 (2003).

Additionally, because the law of nations is federal common law, Congress and the Executive have ample opportunity to respond to judicial actions that they may deem

improper. Thus, absent such a response by the political branches in the exercise of their constitutional powers, it would be premature to jettison the *Filartiga* line of cases and ignore Congress's acquiescence to those decisions as Petitioner requests.[11] Indeed, "[o]ne of the beauties of [federal common law]," wrote Judge Friendly, "is that it permits overworked federal legislators . . . so easily to transfer part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic lawmaking function – with Congress always able to set matters right if they go too far." Friendly, *In Praise of Erie – And the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 419 (1964). Rather than informing the courts that *Filartiga* (or any of the other ATCA cases) went too far, however, Congress instead ratified the decision.

Furthermore, there is little empirical support for *amici*'s contentions. First, the economic policy of the United States, as expressed in public statements and statutes, equally supports ATCA claims. For example, section 502B of the Foreign Assistance Act of 1961 declares the joint view of the Congress and the President that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries." 22 U.S.C. § 2304(a)(1). Also, just a few years ago, the State Department, together with the United Kingdom, established the *Voluntary Principles on Security and Human Rights*, United States Department of State, Dec. 19, 2000, which provides guidelines for companies in the resource extractive industries for "maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms." *Voluntary Principles*, at 1. The Secretary of State has noted that these principles "demonstrat[e] that the best-run [mining] companies realize that they must pay attention not only to the particular needs of their communities, but also to universal standards of human rights, and that in addressing these needs

11. *Basic*, 485 U.S. at 231 ("Judicial interpretation and application, *legislative acquiescence*, and the passage of time have removed any doubt that a private cause of action exists . . .").

and standards ***there is no necessary conflict between profit and principle***."[12]

Second, and more importantly, the Executive Branch knows how to inform a specific court when it feels that issues regarding foreign relations warrant judicial abstention in a particular case.[13] This fact militates against considering the generalized foreign affairs impacts and presumed parade of horribles that the corporate *amici* present. Indeed, all international law cases involving any alien inherently impact foreign relations. However, the fear of impacting foreign relations does not, by itself, counsel overturning over two hundred years of precedent and removing from the courts the ability to decide actions involving the enforcement of rights under the law of nations.[14] Abraham D. Sofaer, the former Legal Adviser to the State Department and federal judge explains:

> Any litigation that involves, directly or indirectly, a foreign government has the potential for affecting the relations of the United States with that country. We do not, however, regard a ***bare*** potential for affecting U.S. foreign relations as sufficient, in and of itself, to warrant dismissal. Cases could arise which present an unacceptable risk that adjudication would embarrass the Executive Branch in its conduct of U.S. foreign

12. Remarks of Secretary of State Madeleine K. Albright, Press Briefing, December 20, 2000, Washington, D.C., http://secretary.state.gov/www/statements/2000/001220.html. (emphasis added).

13. *See, e.g., Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum etc.*, 577 F.2d 1196, 1204 (5th Cir. 1978) ("It is our view that it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here."); *767 Third Avenue Associates v. Consulate General (Yugo)*, 218 F.3d 152, 157 (2d Cir. 2000) (arguing that matters of state succession are nonjusticiable political questions and stating "it is the fundamental position of the United States . . . that . . . [Yugoslavia] has ceased to exist and that no state represents its continuation"); *In re Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d 370, 380 (D.N.J. 2001) (requesting dismissal of action on "any valid legal ground" as contrary to U.S. interest).

14. In fact, courts routinely decide cases that have a substantial impact on foreign affairs. *E.g., Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221 (1986); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

relations, ***leading the Executive to suggest the desirability of judicial abstention.***[15]

The United States further explained to this Court, ***"in the absence of a representation to the contrary," advocating for a dismissal of the action, "courts may properly assume that no unacceptable interference with U.S. foreign relations will occur."*** *Id.* (emphasis added);[16] *see also* U.S. Brief in *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984) (where the Legal Adviser wrote:

> The . . . Concern [over] potential interference with ongoing claims negotiations or other foreign relations does not, in our view, warrant automatic abstention by the court on act of state grounds. As Legal Adviser Monroe Leigh wrote the Solicitor General concerning foreign expropriations in 1975,
>
> In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy. . . .
>
> ***When***, as in this case, ***there is a controlling legal standard*** for compensation, we believe that ***the presumption should be that adjudication would not be inconsistent with foreign policy interests*** . . ."') (emphasis added).

Petitioner and the corporate *amici* apparently disregard the until recent uniform expressions of the United States to the federal courts concerning ATCA which explained that the role of the judiciary is to accept ATCA cases and adjudicate the claims presented because the failure to do so is presumed to adversely impact foreign affairs.

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15. Brief For The United States as *Amicus Curiae* Supporting Respondent, *W.S. Kirkpatrick & Co., Inc., et al., Petitioners v. Environmental Tectonics Corporation, International*, No. 87-2066, 1987 U.S. Briefs Lexis 2066, Appendix (1989) (emphasis added).

16. *Amici* have conducted an exhaustive search. On March 14, 2002, before becoming involved in this action, they received in response to a Freedom of Information Act request copies of all Statements of Interest filed by the United States in ATCA cases to date, and *Amici* have been unable to locate a single contrary statement from the State Department concerning this point.

> Before entertaining a suit alleging a violation of human rights, a court must first conclude that there is ***a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection***. . . . When these conditions have been satisfied there is little danger that judicial enforcement will impair our foreign policy efforts. ***To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights***.

U.S. Memorandum in *Filartiga*, 19 I.L.M. at 604 (emphasis added).

Additionally, corporate *amici*'s are mistaken when they contend that ATCA somehow prevents the Executive from resolving claims or imposes laws rejected by the U.S. on its citizens or the government. First, a rule of international law cannot and will not become part of the federal common law if the U.S. rejects it during its process of formation.[17] Instead, the only rules of law that are actionable are those that have garnered a consensus in the international community that the right is protected by the law of nations, which is, as explained above, part of the law of the land. Moreover, nothing in the ATCA or the cases brought under the act prohibit or limit the Executive's power in conducting foreign affairs, or his authority to resolve or settle international disputes, at least where Congress has acquiesced. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

Furthermore, ATCA cases do not attempt to define or allocate power over the conduct of U.S. foreign affairs. Instead, such tort suits adjudicate the liability of the litigants, which is the standard fare for the judiciary. Thus, the suggestions that ATCA suits might also violate the doctrine of separation of powers or constitute nonjusticiable political questions are mistaken. In fact, in *Ramirez de Arellano v. Weinberger*, an *en banc* panel of the Court of Appeals for the D.C. Circuit held

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17. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102.

that the adjudication of whether the military may run operations on private property in a foreign country that had not yet been appropriated did not present a nonjusticiable political question despite the United States arguing that it did, and the district court finding that the suit presented a direct challenge to the propriety of the U.S. military presence in Central America. 745 F.2d 1500, 1512 (D.C. Cir. 1984), *vacated on other grounds* 471 U.S. 1113 (1985); *see also Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 147 (D.C. Cir. 1983) (Scalia, J.)

> To be sure, because this case involves land in Central America, and because United States military activities in that region are currently the subject of national interest and debate, the issue is presented in a more politically charged context. That may make it, in a sense, a political case – but as the Court noted in *Baker v. Carr* . . . 'the doctrine . . . is one of "political questions," not one of "political cases."').

In the context of separation of powers, *amici*'s arguments concerning the potential impacts on foreign affairs closely parallel the arguments pressed by President Clinton and the United States in *Clinton v. Jones*, which the Court unanimously rejected. The government argued that adjudication of the case posed "serious risks for the institution of the Presidency" as it would undermine and detract from performance of his official duties, including the incredible responsibilities of foreign affairs. 520 U.S. 681, 689, 697 (1997). Though the Court accepted the that Executive's responsibilities and duties were singularly important to the country, the Court nevertheless rejected the argument that the additional burdens imposed by litigation violated separation of powers: "The fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution." *Id.* at 703.

Similarly, the exercise of traditional Article III powers over a lawsuit under ATCA might burden the Executive or interfere with foreign relations. However, such burdens do not establish

a violation of the Constitution under the doctrine of separation of powers, especially if the ATCA claim is asserted against a private corporation or individual and not against a foreign government. Indeed, in *Verlinden B.V. v. Central Bank of Nigeria*, this Court recognized that it was proper for federal courts to determine whether a remedy was available against foreign sovereigns provided that the suit complied with Congress's delegation through the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1601 *et seq.*, knowing that these suit will make foreign relations more difficult or burdensome. 461 U.S. 480, 492-97 (1983). It follows *a fortiori* that because

> the Judiciary may severely burden the Executive Branch by reviewing the legality of [a foreign sovereign's] conduct . . .that the federal courts have power to determine the legality of [a private company's] conduct. The burden on the [Executive] . . . that is a mere by-product of such review surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of [a foreign sovereign's] actions.

Clinton v. Jones, 520 U.S. at 705.

Finally, this Court should bear in mind that "all three branches of the federal government have a say in deciding whether international human rights cases will proceed to final judgment," that judges need not apply "overbroad" rules or laws, that they can and frequently do use comity, *forum non conveniens* and other abstention doctrines to rid the courts of those ATCA cases deemed inappropriate. The Executive Branch may, and frequently does, appear before the courts to urge particular outcomes in human rights cases. And Congress can always modify the act if it disapproves of the direction. Koh, *supra*, 111 HARV. L. REV. at 1860-61. To date, however, Congress has only approved of lower court decisions under ATCA, indeed, ratified them. There is no reason for this Court to change the direction.

B. There Is No Evidence of a Litigation Explosion or Abusive or Frivolous Lawsuits being Pursued under ATCA; The Corporate *Amici*'s Contentions are of No Moment and Show a Profound Distrust for the Operation of the Common Law

Contrary to the corporate *amici*'s contentions, there has not been a litigation explosion in ATCA cases. Instead, as Chief Judge Walker of the Second Circuit has explained: "It is safe to say that, quantitatively, international human rights law is not a major, or even a minor, component of the business of federal courts: it is a miniscule part of what we do." Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 SLU L.J. 539, 539 (1997).

Furthermore, to the extent that frivolous lawsuits are brought, or that "thinly disguised political agendas" are pursued improperly, the Federal Rules of Civil Procedure fully equip the federal courts with ample measures to address such concerns on a case-by-case basis and in proportion to the impropriety found to have occurred.[18] Similarly, the corporate *amici*'s contentions about failing to join a sovereign government, is likewise easily handled by a joinder or interpleader motion, or a motion to dismiss for failure to join an indispensable party. The federal courts are also equipped to address problems with access to evidence and similar issues raised in the corporate *amici*'s brief through the doctrine of *forum non conveniens*. Thus, many of the corporate *amici*'s contentions are simply of no moment.

Moreover, it is simply untrue that victims of genocide, murder, and crimes against humanity typically pursue their cases against those who are deemed the "enemy of all mankind"[19] to chase a deep pocket to serve "only the interests of successful plaintiffs and their lawyers." *Amici* do not have empirical evidence to support this, however, they are unaware

18. To date, *Amici* have not found a single reported ATCA case that has been brought in bad faith. Thus, the corporate *amici*'s contentions in this regard do not appear well-founded.

19. *Kadic*, 70 F.3d at 239.

of any ATCA plaintiff ever collecting full compensation for a single successful claim.[20] But, what they do have is their own personal experience. The Hungarian Jews, for example, limited their claims to $10,000. And, the Bougainvilleans came to the courts of America because the defendant could be found here and sued here. Moreover, their claims are not simply derivative claims; they include allegations of genocide and war crimes, among other things, directly against the defendant who is found in this country. And, their claims are supported by a PNG General and the current Prime Minister who explained in declarations that Rio Tinto was "the reason" for the military response against civilians and naval blockade that killed over 10,000 Bougainvilleans in the 1990s.

Whatever else can be said, it is in the interests of the United States to bring perpetrators of genocide, such as Rio Tinto, to justice. Indeed, the United States does not have any interest – even an economic one – in becoming a haven for those who are accused of being and are the "enemies of all mankind." Yet, that is precisely what would occur if defendants – including corporate ones – that are found in the U.S. are never haled into to court to stand trial for the private rights they violated. As explained above, ATCA is designed, at least in part, to protect the U.S. from becoming such a safe haven.

Moreover, as plainly expressed in the original ATCA, the Framers understood that tort suits between aliens fell within the individual states' general jurisdiction. Even before the American Revolution, civil actions in tort were routinely considered transitory, in that the tortfeasor's wrongful act created an obligation to pay damages, an obligation that followed him across national boundaries and was enforceable wherever he was found. *McKenna v. Fisk*, 42 U.S. 241, 248 (1843); *Slater v. Mexican Nat'l Ry. Co.*, 194 U.S. 120, 126 (1904). Thus, what the ATCA did was provide federal courts with similar state-like general jurisdiction over transitory torts concerning violations of the law of nations. Adopting Petitioner's position would render the federal courts powerless to address these

20. *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2368 (1991).

claims, and thereby abrogate the federal government's authority over issues impacting foreign affairs, which would then return this country to a day reminiscent of the Articles of Confederation that the Framers declared intolerable.

In the end, what troubles corporate *amici* the most is that the law of nations is federal common law rather than a detailed list of specific violations or a lengthy and complex codification of federal statutory rights. They are concerned about the uncertainty of the common law's application. However, this objection is nothing more than objecting to the common law process generally; a process that is fundamental to the American judicial system. Their concerns should be addressed to Congress, not the Court. Negligence cases, for example, do not subscribe to codifications or statutory delineation. Instead, the rule of law is kept clear and very simple; what is reasonable under the circumstances. Admittedly, what is reasonable changes and evolves over time and can be different from State to State. However, the fact that the law of nations is common law, and thus shares with our common law such a fundamental and inherent feature as uncertainty in its application is no reason to dispense with it entirely; the rule of law is clear and accepted by all civilized nations and does not change from nation to nation. Instead, it is precisely because the rule of law is clear that federal courts should enforce it in appropriate cases to help ensure that would be violators of these universal laws engage in reasonable conduct and abide by the law of nations; that body of international law that is part of the law of this land.

CONCLUSION

Congress enacted ATCA to provide aliens a federal forum to seek redress for torts alleging a violation of the law of nations without regard to whether those aliens were injured abroad or at the hands of U.S. nationals to make these tort actions "implicating foreign affairs cognizable in federal courts." *In re Estate of Marcos Human Rights Litig.*, 978 F.2d at 502-03. For the foregoing reasons, the Court should affirm the ruling below and confirm the general jurisdiction Congress bestowed upon the federal courts to decide these tort claims.

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